Supreme Court of the United States

OCTOBER TERM, 1969

No. 84

UNITED STATES OF AMERICA,

Appellant,

—v.—

MILTON C. JORN,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

INDEX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

CR-9-68

UNITED STATES OF AMERICA, PLAINTIFF

vs.

MILTON C. JORN, DEFENDANT

INFORMATION

Violation 26 U.S.C. § 7206 (2). WILLFULLY AIDING AND ASSISTING IN THE PREPARATION & PRESENTATION OF FALSE & FRAUDULENT INCOME TAX RETURNS.

The United States Attorney charges:

COUNT ONE

That on or about the 31st day of January, 1963, in the Central Division, District of Utah, Milton C. Jorn, a resident of Davis County, Utah, hereinafter called the defendant, did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the District Director of Internal Revenue for the Internal Revenue District of Utah, at Salt Lake City, Utah, of an income tax return of Carl and Geneva Boulden for the calendar year 1962, which was false and fraudulent as to material matters in that it set forth that the said taxpayers were entitled under the provisions of the Internal Revenue laws to claim deductions of,

$ 30.00	for contributions to polio, heart, cancer, scouts, all others,
90.00	for union dues,
57.50	for uniforms and tools,
30.00	for ½ telephone, and
447.90	for medical, drugs & hospital expenses,

whereas, the defendant then and there well knew that these claimed deductions were excessive and overstated and that said taxpayers were entitled to claim as deductions for said calendar year not in excess of,

$ 5.00	for contributions to polio, heart, cancer, scouts, all others,
75.00	for union dues,

and that taxpayers were not entitled to claim as deductions any amounts for uniforms and tools, telephone, and medical, drugs and hospital expenses, in violation of Section 7206 (2), Internal Revenue Code; and 26 U.S.C. § 7206 (2).

COUNT TWO

That on or about the 30th day of January, 1964, in the Central Division, District of Utah, Milton C. Jorn, a resident of Davis County, Utah, hereinafter called the defendant, did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the District Director of Internal Revenue for the Internal Revenue District of Utah, at Salt Lake City, Utah, of an income tax of C. J. and Geneva Boulden for the calendar year 1963, which was false and fraudulent as to material matters in that it set forth that the said taxpayers were entitled under the provisions of the Internal Revenue laws to claim deductions of,

$ 20.00	for all other contributions,
44.50	for real estate taxes,
90.00	for union dues,
62.00	for uniforms and tools,
30.00	for ½ telephone,

whereas, the defendant then and there well knew that these claimed deductions were excessive and overstated and that said taxpayers were entitled to claim as deductions for said calendar year not in excess of,

$ 75.00	for union dues,

and that taxpayers were not entitled to claim as deductions any amounts for other contributions, real estate

taxes, uniforms and tools, and ½ telephone, in violation of Section 7206 (2), Internal Revenue Code; and 26 U.S.C. § 7206 (2).

COUNT THREE

That on or about the 30th day of January, 1965, in the Central Division, District of Utah, Milton C. Jorn, a resident of Davis County, Utah, hereinafter called the defendant, did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the District Director of Internal Revenue for the Internal Revenue District of Utah, at Salt Lake City, Utah, of an income tax return of C. J. and Geneva Boulden for the calendar year 1964, which was false and fraudulent as to material matters in that it represented that the said taxpayers were entitled under the provisions of the Internal Revenue laws to claim deductions of,

$ 25.00	for dentists,
20.00	for all other contributions,
195.00	for interest expense to Sugarhouse Finance,
180.00	for Interstate C.U. interest expense,
155.20	for real estate taxes,
90.00	for union dues,
130.00	for uniforms (coveralls),
45.00	for tools,
40.00	for ½ telephone,

whereas, the defendant then and there well knew that these claimed deductions were excessive and overstated and that said taxpayers were entitled to claim as deductions for said calendar year not in excess of,

$ 2.00	for all other contributions,
160.00	for interest expense to Sugarhouse Finance,
117.00	for Interstate C.U. interest expense,
50.00	for real estate taxes,
78.00	for union dues,

and that taxpayers were not entitled to claim as deductions any amounts for dentists, uniforms (coveralls), tools, and ½ telephone, in violation of Section 7206 (2), Internal Revenue Code; and 26 U.S.C. § 7206 (2).

COUNT FOUR

That on or about the 27th day of January, 1963, in the Central Division, District of Utah, Milton C. Jorn, a resident of Davis County, Utah, hereinafter called the defendant, did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the District Director of Internal Revenue for the Internal Revenue District of Utah, at Salt Lake City, Utah, of an income tax return of Grant L. and Vera Nielson for the calendar year 1962, which was false and fraudulent as to material matters in that it represented that the said taxpayers were entitled under the provisions of the Internal Revenue laws to claim deductions of,

$ 40.13	for medicine and drugs,
156.00	for H & A insurance,
70.00	for uniforms and safety shoes,
25.00	for Ass. membership,

whereas, the defendant then and there well knew that these claimed deductions were excessive and overstated and that said taxpayers were entitled to claim as deductions for said calendar year not in excess of,

$125.00	for H & A insurance,
15.00	for uniforms and safety shoes,

and that taxpayers were not entitled to claim as deductions any amounts for medicine and drugs, and Ass. membership, in violation of Section 7206 (2), Internal Revenue Code; and 26 U.S.C. § 7206 (2).

COUNT FIVE

That on or about the 25th day of January, 1964, in the Central Division, District of Utah, Milton C. Jorn, a resident of Davis County, Utah, hereinafter called the defendant, did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the District Director of Internal Revenue for the Internal Revenue District of Utah, at Salt Lake City, Utah, of an income tax return of Grant L. and Vera Nielson for the calendar year 1963, which was false

and fraudulent as to material matters in that it represented that the said taxpayers were entitled under the provisions of the Internal Revenue laws to claim deductions of

$ 37.50	for real estate taxes,
46.50	for medicine and drugs,
156.00	for H & A insurance
70.00	for uniforms and safety equipment,
100.00	for special ed.,

whereas, the defendant then and there well knew that these claimed deductions were excessive and overstated and that taxpayers were not entitled to claim as deductions any amounts for real estate taxes, medicine and drugs, H & A insurance, uniforms and safety equipment, and special ed., in violation of Section 7206 (2), Internal Revenue Code; and 26 U.S.C. § 7206 (2).

COUNT SIX

That on or about the 12th day of February, 1963, in the Central Division, District of Utah, Milton C. Jorn, a resident of Davis County, Utah, hereinafter called the defendant, did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the District Director of Internal Revenue for the Internal Revenue District of Utah, at Salt Lake City, Utah, of an income tax return of Lisle and Cora Price for the calendar year 1962, which was false and fraudulent as to material matters in that it represented that the said taxpayers were entitled under the provisions of the Internal Revenue laws to claim deductions of,

$207.00	for church donations,
35.00	for all other contributions,
156.00	for union dues,
50.00	for uniforms and safety equip.,

whereas, the defendant then and there well knew that these claimed deductions were excessive and overstated and that said taxpayers were entitled to claim as deductions for said calendar year not in excses of,

$ 27.00	for church donations,
36.00	for union dues,

and that taxpayers were not entitled to claim as deductions any amounts for all other contributions, and uniforms and safety equip., in violation of Section 7206 (2), Internal Revenue Code; and 26 U.S.C. § 7206 (2).

COUNT SEVEN

That on or about the 16th day of February, 1964, in the Central Division, District of Utah, Milton C. Jorn, a resident of Davis County, Utah, hereinafter called the defendant, did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the District Director of Internal Revenue for the Internal Revenue District of Utah, at Salt Lake City, Utah, of an income tax return of Lisle and Cora Price for the calendar year 1963, which was false and fraudulent as to material matters in that it represented that the said taxpayers were entitled under the provisions of the Internal Revenue laws to claim deductions of,

$237.50	for church donations,
40.00	for all other contributions,
154.00	for H & A insurance,
50.00	for uniforms and safety equip.,

whereas, the defendant then and there well knew that these claimed deductions were excessive and overstated and that said taxpayers were entitled to claim as deductions for said calendar year not in excess of,

$ 27.50	for church donations,
21.00	for H & A insurance,
25.00	for uniforms and safety equip.,

and that taxpayers were not entitled to claim as deductions any amounts for all other contributions, in violation of Section 7206 (2), Internal Revenue Code; and 26 U.S.C. § 7206 (2).

COUNT EIGHT

That on or about the 30th day of January, 1965, in the Central Division, District of Utah, Milton C. Jorn, a resident of Davis County, Utah, hereinafter called the defendant, did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the District Director of Internal Revenue for the Internal Revenue District of Utah, at Salt Lake City, Utah, of an income tax return of Victor D. and Pauline A. Lemmon for the calendar year 1964, which was false and fraudulent as to material matters in that it represented that the said taxpayers were entitled under the provisions of the Internal Revenue laws to claim deductions of,

$276.20	for real estate taxes,
30.00	for ½ telephone,
48.00	for Association dues,

whereas, the defendant then and there well knew that these claimed deductions were excessive and overstated and that said taxpayers were entitled to claim as deductions for said calendar year not in excess of,

$180.72	for real estate taxes,
14.00	for Association dues,

and that taxpayers were not entitled to claim as deductions any amounts for ½ telephone, in violation of Section 7206 (2), Internal Revenue Code; and 26 U.S.C. § 7206 (2).

COUNT NINE

That on or about the 27th day of February, 1963, in the Central Division, District of Utah, Milton C. Jorn, a resident of Davis County, Utah, hereinafter called the defendant, did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the District Director of Internal Revenue for the Internal Revenue District of Utah, at Salt Lake City, Utah, of an income tax return of Lenora B. Elkington for the calendar year 1962, which was false and

fraudulent as to material matters in that it represented that the said taxpayers was entitled under the provisions of the Internal Revenue laws to claim deductions of,

$ 85.00	for paint as repairs,
125.54	for H & A insurance,
30.00	for ½ telephone service
47.50	for special shoes,

whereas, the defendant then and there well knew that these claimed deductions were excessive and overstated and that said taxpayer was entitled to claim as deductions for said calendar year not in excess of,

$ 40.00	for paint as repairs,
93.86	for H & A insurance,
20.00	for special shoes,

and that taxpayer was not entitled to claim as deductions any amounts for telephone, in violation of Section 7206 (2), Internal Revenue Code; and 26 U.S.C. § 7206 (2).

COUNT TEN

That on or about the 30th day of January, 1964, in the Central Division, District of Utah, Milton C. Jorn, a resident of Davis County, Utah, hereinafter called the defendant, did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the District Director of Internal Revenue for the Internal Revenue District of Utah, at Salt Lake City, Utah, of an income tax return of Lenora B. Elkington for the calendar year 1963, which was false fraudulent as to material matters in that it represented that the taxpayer was entitled under the provisions of the Internal Revenue laws to claim deductions of,

$132.00	for H & A insurance,
30.00	for ½ telephone,
47.50	for special shoes,

whereas, the defendant then and there well knew that these claimed deductions were excessive and overstated

and that said taxpayer was entitled to claim as deductions for said calendar year not in excess of,

$ 93.86	for H & A insurance,
20.00	for special shoes,

and that taxpayer was not entitled to claim as deductions any amounts for telephone, in violation of Section 7206 (2), Internal Revenue Code; and 26 U.S.C. § 7206 (2).

COUNT ELEVEN

That on or about the 14th day of March, 1965, in the Central Division, District of Utah, Milton C. Jorn, a resident of Davis County, Utah, hereinafter called the defendant, did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the District Director of Internal Revenue for the Internal Revenue District of Utah, at Salt Lake City, Utah, of an income tax return of Lenora B. Elkington for the calendar year 1964, which was false and fraudulent as to material matters in that it represented that the taxpayer was entitled under the provisions of the Internal Revenue laws to claim deductions of,

$132.00	for H & A insurance,
30.00	for ½ telephone,
47.50	for special shoes,
20.00	for Association dues,

whereas, the defendant then and there well knew that these claimed deductions were excessive and overstated and that said taxpayer was entitled to claim as deductions for said calendar year not in excess of,

$ 98.72	for H & A insurance,
20.00	for special shoes,

and that taxpayer was not entitled to claim as deductions any amounts for telephone and Association dues, in violation of Section 7206 (2), Internal Revenue Code; and 26 U.S.C. § 7206 (2).

COUNT TWELVE

That on or about the 21st day of March, 1963, in the Central Division, District of Utah, Milton C. Jorn, a resident of Davis County, Utah, hereinafter called the defendant, did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the District Director of Internal Revenue for the Internal Revenue District of Utah, at Salt Lake City, Utah, of an income tax return of Michael R. and Ramona M. Linnell for the calendar year 1962, which was false and fraudulent as to material matters in that it represented that the said taxpayers were entitled under the provisions of the Internal Revenue laws to claim deductions of,

$124.30 for real estate taxes,

whereas, the defendant then and there well knew that this claimed deduction was excessive and overstated and that said taxpayers were not entitled to claim as a deduction any amount for real estate taxes, in violation of Section 7206 (2), Internal Revenue Code; and 26 U.S.C. § 7206 (2).

COUNT THIRTEEN

That on or about the 31st day of January, 1964, in the Central Division, District of Utah, Milton C. Jorn, a resident of Davis County, Utah, hereinafter called the defendant, did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the District Director of Internal Revenue for the Internal Revenue District of Utah, at Salt Lake City, Utah, of an income tax return of Michael R. and Ramona M. Linnell for the calendar year 1963, which was false and fraudulent as to material matters in that it represented that the said taxpayers were entitled under the provisions of the Internal Revenue laws to claim deductions of,

$120.00 for real estate taxes,
45.00 for union dues and ass.,

whereas, the defendant then and there well knew that these claimed deductions were excessive and overstated

and that said taxpayers were not entitled to claim as deductions any amounts for real estate taxes, and union dues and ass., in violation of Section 7206 (2), Internal Revenue Code; and 26 U.S.C. § 7206 (2).

COUNT FOURTEEN

That on or about the 2nd day of February, 1965, in the Central Division, District of Utah, Milton C. Jorn, a resident of Davis County, Utah, hereinafter called the defendant, did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the District Director of Internal Revenue for the Internal Revenue District of Utah, at Salt Lake City, Utah, of an income tax return of M. R. and R. M. Linnell for the calendar year 1964, which was false and fraudulent as to material matters in that it represented that the said taxpayers were entitled under the provisions of the Internal Revenue laws to claim deductions of,

$178.00	for real estate taxes,
92.00	for union dues,

whereas, the defendant then and there well knew that these claimed deductions were excessive and overstated and that said taxpayers were not entitled to claim as deductions any amounts for real estate taxes and union dues, in violation of Section 7206 (2), Internal Revenue Code; and 26 U.S.C. § 7206 (2).

COUNT FIFTEEN

That on or about the 27th day of February, 1963, in the Central Division, District of Utah, Milton C. Jorn, a resident of Davis County, Utah, hereinafter called the defendant, did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the District Director of Internal Revenue for the Internal Revenue District of Utah, at Salt Lake City, Utah, of an income tax return of Wallace R. and Selma Wardle for the calendar year 1962, which was false and fraudulent as to material matters in that it represented that the said taxpayers were entitled under

the provisions of the Internal Revenue laws to claim deductions of,

$125.00	for L.D.S. church contributions,
25.00	for polio, heart, cancer contributions,
25.00	for all other contributions,
180.00	for H & A insurance,

whereas, the defendant then and there well knew that these claimed deductions were excessive and overstated and that said taxpayers were entitled to claim as deductions for said calendar year not in excess of,

$ 15.00	for L.D.S. church contributions,
5.00	for polio, heart, cancer contributions,
10.00	for all other contributions,
88.92	for H & A insurance,

in violation of Section 7206 (2), Internal Revenue Code; and 26 U.S.C. § 7206 (2).

COUNT SIXTEEN

That on or about the 26th day of January, 1964, in the Central Division, District of Utah, Milton C. Jorn, a resident of Davis County, Utah, hereinafter called the defendant, did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the District Director of Internal Revenue for the Internal Revenue District of Utah, at Salt Lake City, Utah, of an income tax return of Wallace R and Selma Wardle for the calendar year 1963, which was false and fraudulent as to material matters in that it represented that the said taxpayers were entitled under the provisions of the Internal Revenue laws to claim deductions of,

$125.00	for L.D.S. church contributions,
25.00	for polio, heart, cancer contributions,
25.00	for all other contributions,
180.00	for H & A insurance,

whereas, the defendant then and there well knew that these claimed deductions were excessive and overstated

and that said taxpayers were entitled to claim as deductions for said calendar year not in excess of,

$ 15.00	for L.D.S. church contributions,
5.00	for polio, heart, cancer contributions,
5.00	for all other contributions,
88.92	for H & A insurance,

in violation of Section 7206 (2), Internal Revenue Code; and 26 U.S.C. § 7206 (2).

COUNT SEVENTEEN

That on or about the 30th day of January, 1965, in the Central Division, District of Utah, Milton C. Jorn, a resident of Davis County, Utah, hereinafter called the defendant, did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the District Director of Internal Revenue for the Internal Revenue District of Utah, at Salt Lake City, Utah, of an income tax return of Wallace R. and Selma Wardle, for the calendar year 1964, which was false and fraudulent as to material matters in that it represented that the said taxpayers were entitled under the provisions of the Internal Revenue laws to claim deductions of,

$220.00	for H & A insurance
135.00	for L.D.S. church contributions,
25.00	for polio, heart, cancer contributions,
35.00	for other contributions,

whereas, the defendant then and there well knew that these claimed deductions were excessive and overstated and that said taxpayers were entitled to claim as deductions for said calendar year not in excess of,

$ 88.92	for H & A insurance
35.00	for L.D.S. church contributions,
5.00	for polio, heart, cancer contributions,
5.00	for all other contributions,

in violation of Section 7206 (2), Internal Revenue Code; and 26 U.S.C. § 7206 (2).

COUNT EIGHTEEN

That on or about the 27th day of February, 1963, in the Central Division, District of Utah, Milton C. Jorn, a resident of Davis County, Utah, hereinafter called the defendant, did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the District Director of Internal Revenue for the Internal Revenue District of Utah, at Salt Lake City, Utah, of an income tax return of Larry and Patsy Wardle for the calendar year 1962, which was false and fraudulent as to material matters in that it represented that the said taxpayers were entitled under the provisions of the Internal Revenue laws to claim deductions of,

$ 30.00	for United Fund contributions,
15.00	for polio, heart, cancer contributions,
25.00	for all other contributions,
35.00	for drugs,
35.00	for ½ telephone,

whereas, the defendant then and there well knew that these claimed deductions were excessive and overstated and that said taxpayers were entitled to claim as deductions for said calendar year not in excess of,

$ 2.00	for United Fund contributions,
2.00	for polio, heart, cancer contributions,

and that taxpayers were not entitled to claim as deductions any amounts for all other contributions, drugs, and telephone expenses, in violation of Section 7206 (2), Internal Revenue Code; and 26 U.S.C. § 7206 (2).

COUNT NINETEEN

That on or about the 22nd day of February, 1964, in the Central Division, District of Utah, Milton C. Jorn, a resident of Davis County, Utah, hereinafter called the defendant, did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the District Director of Internal Revenue for the Internal Revenue District of Utah, at Salt Lake City, Utah, of an income tax return of Martin Larry

and Patsy Wardle for the calendar year 1963, which was false and fraudulent as to material matters in that it represented that the said taxpayers were entitled under the provisions of the Internal Revenue laws to claim deductions of,

$ 30.00	for United Fund contributions,
20.00	for polio, heart, cancer contributions,
25.00	for all other contributions
27.67	for medicine and drugs,
35.00	for ½ telephone,

whereas, the defendant then and there well knew that these claimed deductions were excessive and overstated and that said taxpayers were entitled to claim as deductions for said calendar year not in excess of,

$ 2.00	for United Fund contributions,
2.00	for polio, heart, cancer contributions,

and that taxpayers were not entitled to claim as deductions any amounts for all other contributions, medicine and drugs, and telephone expenses, in violation of Section 7206 (2), Internal Revenue Code; and 26 U.S.C. § 7206 (2).

COUNT TWENTY

That on or about the 17th day of February, 1965, in the Central Division, District of Utah, Milton C. Jorn, a resident of Davis County, Utah, hereinafter called the defendant, did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the District Director of Internal Revenue for the Internal Revenue District of Utah, at Salt Lake City, Utah, of an income tax return of M. Larry and Patsy Wardle for the calendar year 1964, which was false and fraudulent as to material matters in that it represented that the said taxpayers were entitled under the provisions of the Internal Revenue laws to claim deductions of,

$ 43.25	for medicine and drugs,
30.00	for United Fund contributions,
20.00	for polio, heart, cancer contributions,
25.00	for all other contributions,
93.00	for Association-beauty, other deductions,
37.50	for ½ telephone,

whereas, the defendant then and there well knew that these claimed deductions were excessive and overstated and that said taxpayers were entitled to claim as deductions for said calendar year not in excess of,

$ 2.00	for United Fund contributions,
2.00	for polio, heart, cancer contributions,
23.00	for Association-beauty, other deductions,

and that taxpayers were not entitled to claim as deductions any amounts for medicine and drugs, all other contributions, and telephone expenses, in violation of Section 7206 (2), Internal Revenue Code; and 26 U.S.C. § 7206 (2).

COUNT TWENTY-ONE

That on or about the 22nd day of February, 1964, in the Central Division, District of Utah, Milton C. Jorn, a resident of Davis County, Utah, hereinafter called the defendant, did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the District Director of Internal Revenue for the Internal Revenue District of Utah, at Salt Lake City, Utah, of an income tax return of George W. and Lana Wardle for the calendar year 1963, which was false and fraudulent as to material matters in that it represented that the said taxpayers were entitled under the provisions of the Internal Revenue laws to claim deductions of,

$160.00	for L.D.S. church contributions,
35.00	for all other contributions,
130.44	for H & A insurance,
30.00	for union dues,
30.00	for ½ telephone,
65.00	for safety equip., uniforms and tools,

whereas, the defendant then and there well knew that these claimed deductions were excessive and overstated and that said taxpayers were entitled to claim deductions for said calendar year not in excess of,

$ 5.00	for L.D.S. church contributions,
5.00	for all other contributions,
9.90	for H & A insurance,
6.00	for safety equip., uniforms and tools,

and that taxpayers were not entitled to claim as deductions any amounts for union dues, and telephone expenses, in violation of Section 7206 (2), Internal Revenue Code; and 26 U.S.C. § 7206 (2).

COUNT TWENTY-TWO

That on or about the 17th day of February, 1965, in the Central Division, District of Utah, Milton C. Jorn, a resident of Davis County, Utah, hereinafter called the defendant, did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the District Director of Internal Revenue for the Internal Revenue District of Utah, at Salt Lake City, Utah, of an income tax return of George M. and Lana Wardle for the calendar year 1964, which was false and fraudulent as to material matters in that it represented that the said taxpayers were entitled under the provisions of the Internal Revenue laws to claim deductions of,

$ 45.50	for medicine and drugs,
190.00	for H & A insurance,
25.00	for x-rays,
165.00	for L.D.S. church contributions,
35.00	for United Fund contributions,
15.00	for all other contributions,
60.00	for union dues,
30.00	for ½ telephone,
70.00	for safety equipment,

whereas, the defendant then and there well knew that these claimed deductions were excessive and overstated and

that said taxpayers were entitled to claim as deductions for said calendar year not in excess of,

$127.14	for H & A insurance,
15.00	for L.D.S. church contributions,
2.00	for all other contributions,
30.00	for union dues,
15.00	for safety equipment,
3.00	for United Fund contributions,

and that taxpayers were not entitled to claim as deductions any amounts for medicine and drugs, x-rays and telephone expenses, in violation of Section 7206 (2), Internal Revenue Code; and 26 U.S.C. § 7206 (2).

COUNT TWENTY-THREE

That on or about the 27th day of February, 1963, in the Central Division, District of Utah, Milton C. Jorn, a resident of Davis County, Utah, hereinafter called the defendant, did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the District Director of Internal Revenue for the Internal Revenue District of Utah, at Salt Lake City, Utah, of an income tax return of Ramon D. and Villera V. Wardle for the calendar year 1962, which was false and fraudulent as to material matters in that it represented that the said taxpayers were entitled under the provisions of the Internal Revenue laws to claim deductions of,

$ 90.00	for L.D.S. church contributions,
30.00	for United Fund contributions,
30.00	for all other contributions,
122.50	for real estate taxes,
180.00	for H & A insurance,
100.00	for Dr. Wilson,
150.00	for Dr. Kerr,
80.00	for St. Marks,
100.00	for union dues,
30.00	for ½ telephone,
50.00	for uniforms of profession,

whereas, the defendant then and there well knew that these claimed deductions were excessive and overstated and that said taxpayers were entitled to claim as deductions for said calendar year not in excess of,

$ 25.00	for L.D.S. church contributions,
3.00	for United Fund contributions,
2.00	for all other contributions,
70.00	for Dr. Wilson,
119.00	for Dr. Kerr,
50.00	for St. Marks,
30.00	for union dues,

and that taxpayers were not entitled to claim as deductions any amounts for real estate taxes, H & A insurance, telephone, and uniforms of profession in violation of Section 7206 (2), Internal Revenue Code; and 26 U.S.C. § 7206 (2).

COUNT TWENTY-FOUR

That on or about the 22nd day of February, 1964, in the Central Division, District of Utah, Milton C. Jorn, a resident of Davis County, Utah, hereinafter called the defendant, did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the District Director of Internal Revenue for the Internal Revenue District of Utah, at Salt Lake City, Utah, of an income tax return of Ramon D. and Villera V. Wardle for the calendar year 1963, which was false and fraudulent as to material matters in that it represented that the said taxpayers were entitled under the provisions of the Internal Revenue laws to claim deductions of,

$125.00	for L.D.S. church contributions,
30.00	for United Fund contributions,
25.00	for all other contributions,
30.00	for polio, heart, cancer contributions,
165.00	for real estate taxes,
224.00	for H & A insurance,
25.00	for glasses
260.00	for union dues,
30.00	for ½ telephone,
50.00	for uniforms,

whereas, the defendant then and there well knew that these claimed deductions were excessive and overstated and that said taxpayers were entitled to claim as deductions for said calendar year not in excess of,

$ 25.00	for L.D.S. church contributions,
2.00	for United Fund contributions,
1.00	for all other contributions,
2.00	for polio, heart, cancer contributions,
90.00	for union dues,

and that taxpayers were not entitled to claim as deductions any amounts for real estate taxes, H & A insurance, glasses, telephone, and uniforms, in violation of Section 7206 (2), Internal Revenue Code; and 26 U.S.C. § 7206 (2).

COUNT TWENTY-FIVE

That on or about the 26th day of February, 1965, in the Central Division, District of Utah, Milton C. Jorn, a resident of Davis County, Utah, hereinafter called the defendant, did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the District Director of Internal Revenue for the Internal Revenue District of Utah, at Salt Lake City, Utah, of an income tax return of Ramon D. and Villera Wardle for the calendar year 1964, which was false and fraudulent as to material matters in that it represented that the said taxpayers were entitled under the provisions of the Internal Revenue laws to claim deductions of,

$254.00	for H & A insurance deduction,
30.00	for St. Marks deduction,
125.00	for L.D.S. church contributions,
30.00	for United Fund contributions,
20.00	for all other contributions,
30.00	for polio, heart, cancer contributions,
412.50	for home mortgage interest,
215.00	for real estate taxes,
260.00	for union dues,
35.00	for ½ telephone,
50.00	for work clothes,

whereas, the defendant then and there well knew that these claimed deductions were excessive and overstated and that said taxpayers were entitled to claim as deductions for said calendar year not in excess of,

$ 10.00	for St. Marks deduction,
25.00	for L.D.S. church contributions,
2.00	for United Fund contributions,
1.00	for all other contributions,
2.00	for polio, heart, cancer contributions,
190.00	for union dues,

and that taxpayers were not entitled to claim as deductions any amounts for H & A insurance, home mortgage interest, real estate taxes, telephone expenses, and work clothes, in violation of Section 7206 (2), Internal Revenue Code; and 26 U.S.C. § 7206 (2).

DATED this 23 day of Feb., 1968.

WILLIAM T. THURMAN
United States Attorney

WALKER E. ANDERSON
Assistant United States Attorney

AMENDED MINUTE ENTRY (1st page only)

August 27, 1968 *Judge Ritter*

Cr 9-68

UNITED STATES OF AMERICA

vs.

MILTON C. JORN

This matter came on before the court at 10:00 a.m. for jury trial. F. T. Wetzel, Esq., Assistant United States Attorney, appeared for the plaintiff. The defendant was present and represented by counsel, Denis Morrill, Esq.

No challenges for cause were exercised. Two (2) peremptory challenges were exercised by the plaintiff, three (3) peremptory challenges were exercised by the defendant.

The following jurors were duly impaneled and sworn:

Floyd M. Johnson	Edwin Buck
Walter W. Willey	Barbara Tanner
O. D. Bruce	Mrs. Manda Condie
Boyd E. Anderson	George M. Calder
Robert B. Allen	Edward C. Adair
Clarence L. Anderson	Charles H. Baldwin

The jurors were instructed as to their conduct during this and all future recesses during the trial and excused to 2:00 p.m.

All other jurors not impaneled in this case were excused permanently with the thanks of the court.

Trial resumed at 2:00 p.m. with counsel and parties as heretofore listed present.

Plaintiff's exhibits Nos. 1 through 11 inclusive were marked for identification.

Out of the presence of the jury, plaintiff moved to dismiss Counts 1 through 11 inclusive, 18, 19, and 20 of the information. Motion was granted by the court, and an amended information was filed. Defendant waived reading of the information and entered a plea of not guilty to each of eleven (11) counts of the information. The jury was returned to the jury box.

Mr. Morrill moved to invoke the exclusion of witness rule. Motion granted, and all witnesses were admonished by the court and withdrew from the court room.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

Filed in United States District Court, District of Utah.
Time: Aug. 27, 1968 Andrew John Brau, Clerk.

CR-9-68

UNITED STATES OF AMERICA, PLAINTIFF

vs.

MILTON C. JORN, DEFENDANT

AMENDED INFORMATION

Vio. 26 U.S.C. § 7206 (2). WILFULLY AIDING AND ASSISTING IN THE PREPARATION & PRESENTATION OF FALSE & FRAUDULENT INCOME TAX RETURNS.

The United States Attorney charges:

COUNT ONE

That on or about the 21st day of March, 1963, in the Central Division, District of Utah, Milton C. Jorn, a resident of Davis County, Utah, hereinafter called the defendant, did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the District Director of Internal Revenue for the Internal Revenue District of Utah, at Salt Lake City, Utah, of an income tax return of Michael R. and Ramona M. Linnell for the calendar year 1962, which was false and fraudulent as to material matters in that it represented that the said taxpayers were entitled under the provisions of the Internal Revenue laws to claim deductions of,

$124.30 for real estate taxes,

whereas, the defendant then and there well knew that this claimed deduction was excessive and overstated and

that said taxpayers were not entitled to claim as a deduction any amount for real estate taxes, in violation of Section 7206 (2), Internal Revenue Code; and 26 U.S.C. § 7206 (2).

COUNT TWO

That on or about the 31st day of January, 1964, in the Central Division, District of Utah, Milton C. Jorn, a resident of Davis County, Utah, hereinafter called the defendant, did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the District Director of Internal Revenue for the Internal Revenue District of Utah, at Salt Lake City, Utah, of an income tax return of Michael R. and Ramona M. Linnell for the calendar year 1963, which was false and fraudulent as to material matters in that it represented that the said taxpayers were entitled under the provisions of the Internal Revenue laws to claim deductions of,

$120.00	for real estate taxes,
45.00	for union dues and ass.,

whereas, the defendant then and there well knew that these claimed deductions were excessive and overstated and that said taxpayers were not entitled to claim as deductions any amounts for real estate taxes, and union dues and ass., in violation of Section 7206 (2), Internal Revenue Code; and 26 U.S.C. § 7206 (2).

COUNT THREE

That on or about the 2nd day of February, 1965, in the Central Division, District of Utah, Milton C. Jorn, a resident of Davis County, Utah, hereinafter called the defendant, did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the District Director of Internal Revenue for the Internal Revenue District of Utah, at Salt Lake City, Utah, of an income tax return of M. R. and R. M. Linnell for the calendar year 1964, which was false and fraudulent as to material matters in that it represented

that the said taxpayers were entitled under the provisions of the Internal Revenue laws to claim deductions of,

$178.00	for real estate taxes,
92.00	for union dues,

whereas, the defendant then and there well knew that these claimed deductions were excessive and overstated and that said taxpayers were not entitled to claim as deductions any amounts for real estate taxes and union dues, in violation of Section 7206 (2), Internal Revenue Code; and 26 U.S.C. § 7206 (2).

COUNT FOUR

That on or about the 27th day of February, 1963, in the Central Division, District of Utah, Milton C. Jorn, a resident of Davis County, Utah, hereinafter called the defendant, did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the District Director of Internal Revenue for the Internal Revenue District of Utah, at Salt Lake City, Utah, of an income tax return of Ramon D. and Villera V. Wardle for the calendar year 1962, which was false and fraudulent as to material matters in that it represented that the said taxpayers were entitled under the provisions of the Internal Revenue laws to claim deductions of,

$ 90.00	for L.D.S. church contributions,
30.00	for United Fund contributions,
30.00	for all other contributions
122.50	for real estate taxes,
180.00	for H & A insurance,
100.00	for Dr. Wilson,
150.00	for Dr. Kerr,
80.00	for St. Marks,
100.00	for Union dues,
30.00	for ½ telephone,
50.00	for uniforms of profession,

whereas, the defendant then and there well knew that these claimed deductions were excessive and overstated

and that said taxpayers were entitled to claim as deductions for said calendar year not in excess of,

$ 25.00	for L.D.S. church contributions,
3.00	for United Fund contributions,
2.00	for all other contributions,
70.00	for Dr. Wilson,
119.00	for Dr. Kerr,
50.00	for St. Marks,
30.00	for union dues,

and that taxpayers were not entitled to claim as deductions any amounts for real estate taxes, H & A insurance, telephone, and uniforms of profession, in violation of Section 7206 (2), Internal Revenue Code; and 26 U.S.C. § 7206 (2).

COUNT FIVE

That on or about the 22nd day of February, 1964, in the Central Division, District of Utah, Milton C. Jorn, a resident of Davis County, Utah, hereinafter called the defendant, did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the District Director of Internal Revenue for the Internal Revenue District of Utah, at Salt Lake City, Utah, of an income tax return of Ramon D. and Villera V. Wardle for the calendar year 1963, which was false and fraudulent as to material matters in that it represented that the said taxpayers were entitled under the provisions of the Internal Revenue laws to claim deductions of,

$125.00	for L.D.S. church contributions,
30.00	for United Fund contributions,
25.00	for all other contributions,
30.00	for polio, heart, cancer contributions,
165.00	for real estate taxes,
224.00	for H & A insurance,
25.00	for glasses
260.00	for union dues,
30.00	for ½ telephone,
50.00	for uniforms,

whereas, the defendant then and there well knew that these claimed deductions were excessive and overstated and that said taxpayers were entitled to claim as deductions for said calendar year not in excess of,

$ 25.00	for L.D.S. church contributions,
2.00	for United Fund contributions,
1.00	for all other contributions,
2.00	for polio, heart, cancer contributions,
90.00	for union dues,

and that taxpayers were not entitled to claim as deductions any amounts for real estate taxes, H & A insurance, glasses, telephone, and uniforms, in violation of Section 7206 (2), Internal Revenue Code; and 26 U.S.C. § 7206 (2).

COUNT SIX

That on or about the 26th day of February, 1965, in the Central Division, District of Utah, Milton C. Jorn, a resident of Davis County, Utah, hereinafter called the defendant, did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the District Director of Internal Revenue for the Internal Revenue District of Utah, at Salt Lake City, Utah, of an income tax return of Ramon D. and Villera Wardle for the calendar year 1964, which was false and fraudulent as to material matters in that it represented that the said taxpayers were entitled under the provisions of the Internal Revenue laws to claim deductions of,

$254.00	for H & A insurance deduction,
30.00	for St. Marks deduction,
125.00	for L.D.S. church contributions,
30.00	for United Fund contributions,
20.00	for all other contributions,
30.00	for polio, heart, cancer contributions,
412.50	for home mortgage interest,
215.00	for real estate taxes,
260.00	for union dues,
35.00	for ½ telephone,
50.00	for work clothes,

whereas, the defendant then and there well knew that these claimed deductions were excessive and overstated and that said taxpayers were entitled to claim as deductions for said calendar year not in excess of,

$ 10.00	for St. Marks deduction,
25.00	for L.D.S. church contributions,
2.00	for United Fund contributions,
1.00	for all other contributions,
2.00	for polio, heart, cancer contributions,
190.00	for union dues,

and that taxpayers were not entitled to claim as deductions any amounts for H & A insurance, home mortgage interest, real estate taxes, telephone expense, and work clothes, in violation of Section 7206 (2), Internal Revenue Code; and 26 U.S.C. § 7206 (2).

COUNT SEVEN

That on or about the 22nd day of February, 1964, in the Central Division, District of Utah, Milton C. Jorn, a resident of Davis County, Utah, hereinafter called the defendant, did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the District Director of Internal Revenue for the Internal Revenue District of Utah, at Salt Lake City, Utah, of an income tax return of George W. and Lana Wardle for the calendar year 1963, which was false and fraudulent as to material matters in that it represented that the said taxpayers were entitled under the provisions of the Internal Revenue laws to claim deductions of,

$160.00	for L.D.S. church contributions,
35.00	for all other contributions,
130.44	for H & A insurance,
30.00	for union dues,
30.00	for ½ telephone,
65.00	for safety equip., uniforms and tools,

whereas, the defendant then and there well knew that these claimed deductions were excessive and overstated

and that said taxpayers were entitled to claim as deductions for said calendar year not in excess of,

$ 5.00	for L.D.S. church contributions,
5.00	for all other contributions,
9.90	for H & A insurance,
6.00	for safety equip., uniforms and tools,

and that taxpayers were not entitled to claim as deductions any amounts for union dues, and telephone expenses, in violation of Section 7206 (2), Internal Revenue Code; and 26 U.S.C. § 7206 (2).

COUNT EIGHT

That on or about the 17th day of February, 1965, in the Central Division, District of Utah, Milton C. Jorn, a resident of Davis County, Utah, hereinafter called the defendant, did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the District Director of Internal Revenue for the Internal Revenue District of Utah, at Salt Lake City, Utah, of an income tax return of George M. and Lana Wardle for the calendar year 1964, which was false and fraudulent as to material matters in that it represented that the said taxpayers were entitled under the provisions of the Internal Revenue laws to claim deductions of,

$ 45.50	for medicine and drugs,
190.00	for H & A insurance,
25.00	for x-rays,
165.00	for L.D.S. church contributions,
35.00	for United Fund contributions,
15.00	for all other contributions,
60.00	for union dues,
30.00	for ½ telephone,
70.00	for safety equipment,

whereas, the defendant then and there well knew that these claimed deductions were excessive and overstated and that said taxpayers were entitled to claim as deductions for said calendar year not in excess of,

$127.14	for H & A insurance,
15.00	for L.D.S. church contributions,
2.00	for all other contributions,
30.00	for union dues,
15.00	for safety equipment,
3.00	for United Fund contributions,

and that taxpayers were not entitled to claim as deductions any amounts for medicine and drugs, x-rays and telephone expenses, in violation of Section 7206 (2), Internal Revenue Code; and 26 U.S.C. § 7206 (2).

COUNT NINE

That on or about the 27th day of February, 1963, in the Central Division, District of Utah, Milton C. Jorn, a resident of Davis County, Utah, hereinafter called the defendant, did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the District Director of Internal Revenue for the Internal Revenue District of Utah, at Salt Lake City, Utah, of an income tax return of Wallace R. and Selma Wardle for the calendar year 1962, which was false and fraudulent as to material matters in that it represented that the said taxpayers were entitled under the provisions of the Internal Revenue laws to claim deductions of,

$125.00	for L.D.S. church contributions,
25.00	for polio, heart, cancer contributions,
25.00	for all other contributions,
180.00	for H & A insurance,

whereas, the defendant then and there well knew that these claimed deductions were excessive and overstated and that said taxpayers were entitled to claim as deductions for said calendar year not in excess of,

$ 15.00	for L.D.S. church contributions,
5.00	for polio, heart, cancer contributions,
10.00	for all other contributions,
88.92	for H & A insurance,

in violation of Section 7206 (2), Internal Revenue Code; and 26 U.S.C. § 7206 (2).

COUNT TEN

That on or about the 26th day of January, 1964, in the Central Division, District of Utah, Milton C. Jorn, a resident of Davis County, Utah, hereinafter called the defendant, did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the District Director of Internal Revenue for the Internal Revenue District of Utah, at Salt Lake City, Utah, of an income tax return of Wallace R. and Selma Wardle for the calendar year 1963, which was false and fraudulent as to material matters in that it represented that the said taxpayers were entitled under the provisions of the Internal Revenue laws to claim deductions of,

$125.00	for L.D.S. church contributions,
25.00	for polio, heart, cancer contributions,
25.00	for all other contributions,
180.00	for H & A insurance,

whereas, the defendant then and there well knew that these claimed deductions were excessive and overstated and that said taxpayers were entitled to claim as deductions for said calendar year not in excess of,

$ 15.00	for L.D.S. church contributions,
5.00	for polio, heart, cancer contributions,
5.00	for all other contributions,
88.92	for H & A insurance,

in violation of Section 7206 (2), Internal Revenue Code; and 26 U.S.C. § 7206 (2).

COUNT ELEVEN

That on or about the 30th day of January, 1965, in the Central Division, District of Utah, Milton C. Jorn, a resident of Davis County, Utah, hereinafter called the defendant, did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and

presentation to the District Director of Internal Revenue for the Internal Revenue District of Utah, at Salt Lake City, Utah, of an income tax return of Wallace R. and Selma Wardle, for the calendar year 1964, which was false and fraudulent as to material matters in that it represented that the said taxpayers were entitled under the provisions of the Internal Revenue laws to claim deductions of,

$220.00	for H & A insurance
135.00	for L.D.S. church contributions,
25.00	for polio, heart, cancer contributions,
35.00	for other contributions,

whereas, the defendant then and there well knew that these claimed deductions were excessive and overstated and that said taxpayers were entitled to claim as deductions for said calendar year not in excess of,

$ 88.92	for H & A insurance,
35.00	for L.D.S. church contributions,
5.00	for polio, heart, cancer contributions,
5.00	for all other contributions,

in violation of Section 7206 (2), Internal Revenue Code; and 26 U.S.C. § 7206 (2).

DATED this 19th day of August, 1968.

WILLIAM T. THURMAN
United States Attorney

By /s/ F. T. Wetzel
F. T. WETZEL
Assistant United States Attorney

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Cr 9-68

UNITED STATES OF AMERICA, PLAINTIFF

-v-

MILTON C. JORN, DEFENDANT

Salt Lake City, Utah
August 27, 1968

BEFORE: The Honorable WILLIS W. RITTER
Chief Judge

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For the Plaintiff:

F. T. WETZEL
Assistant U. S. Attorney
200 P. O. & Courthouse Bldg.
Salt Lake City, Utah

For the Defendant:

DENIS R. MORRILL
Attorney at Law
206 El Paso Natural Gas Bldg.
Salt Lake City, Utah

[fol. 2] August 27, 1968

THE COURT: Suppose we call the jury in the Jorn case and then I can excuse the rest of the jurors.

(Whereupon a jury of twelve was duly impaneled and sworn.)

THE COURT: Now, will you folks come back here at two o'clock this afternoon. I think maybe we will be ready to go on with the case at that time.

* * * *

AFTERNOON SESSION

THE COURT: Now, what is this about? What is it you wanted to do?

MR. WETZEL: Your Honor, this case was originally filed by Mr. Anderson. It had 25 counts. In going over the transcript of the preliminary hearing, the memories of a number of the witnesses simply were not sufficient, in my estimation, to justify presenting them to the court. I would move that counts 1 through 11 and 18, 19, and 20 be dismissed and that we be permitted to file an amended information showing only the eleven remaining counts so that the defendant would not be prejudiced by showing something he is not charged with.

I have discussed the matter with counsel for the defense and given him a copy of the proposed amended [fol. 3] information some days ago.

THE COURT: Maybe if we give you a little more time you will dismiss some more. This is a whole bundle of two-bit stuff, it looks to me like.

MR. WETZEL: Well, your Honor, there are just four taxpayers. There would have been eight others, which I don't—I think if we don't make a case on eleven it just isn't there, because their memories—they just said, "I don't remember as to these items." There will be just four taxpayers. There will be five, including one wife, but it will be the returns of just four husband and wife taxpayers. I think we need that many to show a pattern.

THE COURT: Well, I will tell you what I am going to do. How many do you want to dismiss in all?

MR. WETZEL: Fourteen.

THE COURT: All right. Now, here are 25 counts charged against the man, and you want to dismiss fourteen of them today, so you have eleven left.

MR. WETZEL: Yes, your Honor.

THE COURT: Well, that indicates to me that you haven't completed your investigation in this matter.

MR. WETZEL: No, your Honor. I think the investigation was well prepared. It is just that the witnesses' memories at the preliminary hearing were just lacking.

THE COURT: Well, you see, that wasn't prepared [fol. 4] very well then. That is why I like a preliminary hearing. That is where you fellows have to show your hand, and it lets the defendant know what he has to meet, and it also lets you folks know where the holes in your case are. I am not so sure we should proceed in this state of affairs.

What do you say, Counsel?

MR. MORRILL: Well, your Honor, I don't really know what I can say. I can't see—

THE COURT: Where does this man live?

MR. MORRILL: He lives in Bountiful, your Honor.

THE COURT: Bountiful?

MR. MORRILL: Yes, sir.

THE COURT: Is he a lawyer?

MR. MORRILL: No, your Honor. At the present time he works on a construction crew.

THE COURT: What was he doing here?

MR. MORRRILL: At this time he was preparing income tax returns for other people.

THE COURT: Was he an accountant?

MR. MORRILL: He has had accounting training.

THE COURT: He has had some accounting training?

MR. MORRILL: Yes, sir.

THE COURT: He has quit the business now?

MR. MORRILL: Yes, sir. He hasn't prepared returns for—what, two years?

[fol. 5] THE DEFENDANT: Since 1964.

MR. MORRILL: Since 1964. Since that time.

THE COURT: What is the penalty for this?

MR. WETZEL: Not more than five thousand dollars or three years or both on each count.

THE COURT: Well, after I recessed this morning, I looked at this file, went through those counts. One of them I remember. He took $90 church donation, and they reduced that to 75. Now that is a big item, that is. That is one count, part of one count.

MR. MORRILL: Well, your Honor, if I might point this out. This would be one of our legal points, that the materiality—The statute says "material matter," and the materiality of these items would be one of our legal arguments.

THE COURT: How many witnesses are you going to have, Mr. Wetzel?

MR. WETZEL: One from the Director's office to lay ground work for the returns and five taxpayers.

THE COURT: Well, how long is this case going to take?

MR. WETZEL: Well, unless there is extensive cross-examination, I think we should be able to finish this afternoon.

THE COURT: Well, on your representation that we [fol. 6] will be through this afternoon we will start then. Do you want to start before you file your amended information?

MR. WETZEL: No, your Honor. May the record show that I have furnished a copy to defense counsel.

THE COURT: All right, bring the jury in.

THE CLERK: Your Honor, does he have to be arraigned on this amended complaint?

THE COURT: Yes, I guess we ought to arraign him on the amended complaint.

Tell him to keep the jury out.

THE CLERK: Do you want it read?

MR. MORRILL: No, we have waived the reading.

MR. WETZEL: The defendant is before the court for arraignment on eleven counts of alleged violation of 26 USC 7206(2), wilfully aiding and assisting in the

preparation and presentation of false and fraudulent income tax returns. Maximum penalty on each count, $5,000, not more than three years, or both.

THE COURT: All right, is he ready to plead?

MR. MORRILL: Ready to plead.

THE COURT: Take his plea.

THE CLERK: Milton C. Jorn, as to the amended information before this court what is your plea as to count 1?

THE DEFENDANT: Not guilty.

[fol. 7] THE CLERK: As to count 2?

THE DEFENDANT: Not guilty.

THE CLERK: Count 3?

THE DEFENDANT: Not guilty.

THE CLERK: Count 4?

THE DEFENDANT: Not guilty.

THE CLERK: Count 5?

THE DEFENDANT: Not guilty.

THE CLERK: Count 6?

THE DEFENDANT: Not guilty.

THE CLERK: Count 7?

THE DEFENDANT: Not guilty.

THE CLERK: Count 8?

THE DEFENDANT: Not guilty.

THE CLERK: Count 9?

THE DEFENDANT: Not guilty.

THE CLERK: Count 10?

THE DEFENDANT: Not guilty.

THE CLERK: Count 11?

THE DEFENDANT: Not guilty.

THE CLERK: Not guilty as to all eleven counts, your Honor.

THE COURT: Now, ordinarily I wouldn't rush right into the trial so soon after the filing of the amended information. If you folks want some additional time to get [fol. 8] ready, I won't stand in your way.

MR. MORRILL: No, your Honor, I believe we have had sufficient time.

THE COURT: You are ready to proceed?

MR. MORRILL: Yes, sir.

THE COURT: And you are ready?

MR. WETZEL: Yes, sir.

THE COURT: All right, call the jury in.

(Jury in the box.)

THE COURT: Proceed.

MR. WETZEL: Your Honor, Counsel for the defense—

THE COURT: I don't think you need any opening statement.

MR. WETZEL: All right. Mr. Jensen, Joell Jensen.

MR. MORRILL: Due to the repetitive nature of some of these witnesses I would like to have them excused.

THE COURT: All right. Keep them available so we do not lose any time, Marshal.

THE MARSHAL: Yes, sir. Will the witnesses please come this way.

MR. WETZEL: Mr. Jensen, you may stay. You are the first.

THE COURT: Now, you witnesses are to remain out of the courtroom during the testimony. We will bring one in at a time. You are to remain out of the court-[fol. 9] room, and you are to do something else while you are out there, out of the courtroom waiting for your turn to come in and testify: You are very strongly admonished not to discuss any of the matters involved in this lawsuit among yourselves out there. Do not discuss this case at all or any of the matters you are involved in. Don't let anybody discuss them with you and don't discuss them among yourselves.

All right.

(Witnesses excused.)

JOELL A. JENSEN

called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WETZEL:

Q Will you state your name and address, sir.

A My name is Joell A. Jensen. The first name is

spelled (spelling) J-o-e-l-l. My address is: In care of the District Director's office in Salt Lake City.

Q What is your occupation?

A My occupation is chief, collection division.

Q How long have you been so employed?

A Six years.

Q What are your duties in that capacity?

A Part of my duties are to supervise the receipt of tax returns, the processing of tax returns, and the stor-

[fol. 10] age and maintenance of the tax return.

(Plaintiff's Exhibits Nos. 1 thru 11 were thereupon marked for identification.)

Q (By Mr. Wetzel) I hand you what has been marked for identification as Plaintiff's Exhibits 1 through 11 and ask you to examine them and identify them, if you can.

A Exhibit No. 1 is a 1962 individual income tax return.

THE COURT: Can't you get a stipulation from counsel about those? What is the use of having him just recite what appears obvious: that is, they are income tax returns.

MR. MORRILL: We would stipulate they are income tax returns.

THE COURT: From the office of the Director.

MR. MORRILL: Yes.

THE COURT: Have them marked.

MR. WETZEL: They are marked already, your Honor.

THE COURT: One exhibit?

MR. WETZEL: One through 11, your Honor.

THE COURT: Each one a different exhibit?

MR. WETZEL: Yes. They have been marked, your Honor.

THE COURT: All right, offer them.

MR. WETZEL: I offer them in evidence.

THE COURT: Any objection?

MR. MORRILL: No objection.

[fol. 11] THE COURT: Received in evidence.

(The documents marked Plaintiff's Exhibits Nos. 1 thru 11 for identification were received in evidence.)

MR. WETZEL: I have no further questions.
THE COURT: Step down.

(Witness excused.)

THE COURT: Well, who is your next witness?
MR. WETZEL: Mr. Linnell.
THE CLERK: Be sworn, sir.

(Whereupon the witness was duly sworn.)

MR. MORRILL: Your Honor, may I make a statement.

THE COURT: Surely.

MR. MORRILL: In view of the transcript in the preliminary hearing in this matter, it is my feeling that each of these taxpayers should be warned as to his Constitutional rights before testifying, because I feel there is a possibility of a violation of the law.

THE COURT: Well, we wouldn't want anybody to talk himself into a federal penitentiary here, so what the court has to say to you is this: that the defendant on trial is charged with wilfully and knowingly aiding and assisting in, and counseling, procuring and advising in the preparation and presentation to the District Director of Internal Revenue for the Internal Revenue District of Utah income tax returns which are false and fraudulent as to material matters; and they then spell out in [fol. 12] what particular.

You are a taxpayer, and I suppose they are going to ask you what he counseled and advised you to do; and, if this return should turn out to be false and fraudulent, as the charge says it is, you have a Constitutional right. The Constitution of the United States gives you several rights. In the first place, you don't have to say a word at all, to anybody, investigator or anybody else, until you talk to your attorney and see what his advice would be in the matter.

Now, an attorney is a very important fellow in a situation like this. I don't care how brilliant a layman may think he is—he may be—anybody that is in that kind of a situation needs a lawyer to talk to him about it before he opens his mouth and puts his foot in it. That is his right.

Now, another Constitutional right you have is to say nothing at all if you don't want to. That is the Fifth Amendment to the Constitution of the United States. You have the right to just say nothing. That is involved in what we lawyers call the right against self-incrimination. That Constitutional right means, in everyday layman's talk, that the Government has to produce evidence, has the burden to produce the evidence, has the burden to produce enough evidence to convince the jury beyond a reasonable doubt. You are presumed innocent. You need not say anything if you do not want to. The Government has the burden, and the Fifth Amendment means [fol. 13] that the Government cannot get the evidence to convict you from your own mouth. You have the right to remain silent.

All right, those are your very important rights. Now, you don't need to say anything if you don't want to. You have the right to talk to a lawyer if you want to; or, if at any time during the interrogation you decide you want a lawyer, you can have one. If you don't have the money to hire a lawyer, the court will appoint one for you at no expense to you at all. We don't have people convicted because they can't afford to hire a lawyer. They are provided with a lawyer if they need one, want one, don't have the means to hire one. You have the right against self-incrimination. They are not entitled to interrogate you about anything if you don't want them to.

Well, what do you want to do?

THE WITNESS: Your Honor, my wife and I have had it pointed out that our returns have information in them that we know is wrong, and we have admitted this, and I would admit it farther in this court.

THE COURT: Have you talked to a lawyer?

THE WITNESS: No, sir.

THE COURT: I am not going to let you admit it any further in this court. That is all there is about that. The admissions you have already made were very likely [fol. 14] obtained from you without telling you what your Constitutional rights are.

THE WITNESS: No, sir.

THE COURT: What is that?

THE WITNESS: We were advised at the time we were first contacted by the Internal Revenue Service.

THE COURT: If you were, you are the only taxpayer in the United States that has been so advised, because they do not do that when they first contact you. They don't do that. What they do is: They send an agent around to check your books, and he doesn't tell you about those things. They don't start telling you what we are talking about here until they decide there should be a criminal prosecution and they are about to present the matter to that department of the Internal Revenue Service that investigates the possibility of a criminal prosecution.

Now, I have these cases in here all the time, and that is their practice. There is a unit upstairs in the Internal Revenue Service called the Intelligence Unit, and the agents in the Intelligence Unit are the ones to which it is referred to work up the criminal case, if they think there is a criminal case.

You step down.

Are all your witnesses in this shape?

MR. WETZEL: Your Honor, by the time any of [fol. 15] these witnesses were contacted there was a criminal investigation, not of the witnesses, but of the defendant.

It is true that Internal Revenue Service does not require this warning until after the first meeting with the Special Agent. It is the practice in this office they do give them this warning. It is not required, but they do.

THE COURT: Do you know what they say to them? You haven't been in here. We have had cases in here, and it is very rare that the warnings they give meet the decisions of the Supreme Court of the United States that have been recently handed down. The Supreme Court has been spelling this out very recently, and it has been unusual that the agents, not just Revenue agents, but the Treasury agents, FBI agents—it has been very rare in here that they have warned the individual properly.

If we have this kind of a situation, I would want to permit counsel to voir dire the witness—each one of

them—on whether he was warned properly or whether he wasn't warned properly.

I don't think we ought to take sworn testimony from these people who stand in very good shape to get prosecuted here. You prosecute this man, and the first thing you know you will be in here prosecuting all these witnesses.

MR. WETZEL: Your Honor, the testimony will show that they were not aware what was in these—these falsities.

[fol. 16] THE COURT: Now, Mr. Wetzel, you know that is no defense to a criminal charge.

MR. WETZEL: Your Honor, under this section it has to be knowingly and wilfully.

THE COURT: That is right, but when they put their signatures to an income tax return, they can't escape full civil and criminal responsibility, if that is a false return, by saying, "Oh, I didn't know it was illegal." This involves taking deductions.

One case, I have already mentioned, I notice the taxpayer claimed $90 donation to the Church, and he made only $75 donation to the Church. I think that is pretty small stuff. But you multiply that by a number of cases, and it amounts to something.

Now, do you mean to tell me that the fellow who prepared the tax return cooked that up out of his own head, and the taxpayer didn't know what he was doing when he put that $90 down?

MR. WETZEL: Yes, sir, that is precisely it. We have a more flagrant example, like 179—

THE COURT: Well, I will tell you what is going to happen to this case:

Ladies and gentlemen, it won't be necessary for you to attend the court any further on this matter. I am going to excuse you permanently, as I have the rest of [fol. 17] the jury, with the thanks of the court for your coming here and helping us in these matters. I know it is a sacrifice to all of you to lay aside your personal, as well as business, matters to come down here. We summon you, and you do not have any choice about coming. I do try to be lenient about excuses. However, I thank

you very kindly for your coming down. Go to the clerk's office, and they will make arrangements to pay you for this service.

(Jury retires.)

THE COURT: Now, bring those taxpayers in here.

MR. WETZEL: Sir?

THE COURT: I am talking to the marshal.

Now, state the names of the taxpayers to the court reporter.

MR. WETZEL: Michael Linnell, Ramon Wardle, George Wardle, Lana Wardle, Selma Wardle—would be the ones who would testify.

THE COURT: Now, the court wants to say to you taxpayers who have been called— Sit down, Mr. Wetzel, you are in my way—who have been called in here to testify against the man who prepared your income tax return: The charge against that man is that he assisted in preparing—I will read it to you:

That he did wilfully and knowingly aid and assist in, and counsel, procure and advise in the preparation and [fol. 18] presentation to the District Director of Internal Revenue for the Internal Revenue District of Utah, at Salt Lake City, Utah, of income tax returns for various years which were false and fraudulent as to material matters in that they represented various figures that were not true.

Now, the reason I have called you in here to talk to you is that the Constitution of the United States gives you a right to an attorney before you testify in any such way as this.

Do you have an attorney? Have you consulted an attorney, any of you, in this matter?

Well, you have a right to an attorney before you testify and, if you can't afford an attorney yourself, you have the right to an attorney and the court will appoint one at no cost to you to advise with you and let you know what your Constitutional rights are in these matters.

Now, that right to an attorney is a very important thing. You may think you know how to protect your-

selves, protect your Constitutional rights, but until you talk to a lawyer you may not know. As a matter of fact, it is very unusual that you would know. So you are entitled to a lawyer. If you can't afford one, the court will appoint one for you to advise you. And, in the second place, you don't have to say anything to anybody, the Court, the Agency, the District Attorney, or anybody else. You are under no obligation to say a [fol. 19] word if you do not want to, because what you say may be used against you in a criminal proceeding, just like the one that is confronting this man.

Now, all of this the Constitution guarantees you for the purpose of giving you the third Constitutional protection, and that is that you may not be compelled to testify or to give evidence against yourself. Nobody can tell you in this free land of ours to give evidence against yourself; and, in order to protect that Constitutional right against self-incrimination, you are given a right to an attorney, you are given a right to have an attorney appointed for you. You are given the right to have that attorney at no cost to yourself, if you want one. All of this is in protection of the Constitutional right against self-incrimination.

Now, you are entitled to all those rights, and I am not going to let you testify here until you have some time to consult about it, get yourself an attorney and ask his advice about what you are doing.

You see, what it boils down to is that this man helped you—this says that he did wilfully and knowingly aid you and assist you and counsel you and procure and advise in the preparation of income tax returns which were false and fraudulent as to material matters.

Now, if what this information says is true, you are just as guilty as he is; and, before you start swearing [fol. 20] yourselves into a federal penitentiary on this witness stand, I am going to see that you have time and the opportunity to consult with counsel.

Now, this works unfairly, really—these things. Nobody needs to tell an old convict, an old professional criminal, about these things. They know all about it. They know more than the lawyers know about it. Whenever an agent or an FBI man or an Treasury agent

comes around and tries to get them to give them statements, they just laugh at him. But some young person or some person not so young who is illy informed, doesn't know his rights, some person who is of foreign extraction, doesn't understand our language, doesn't understand our Constitution and practices, some person of that kind, disadvantaged person of one kind and another —those people are the ones that get trapped by this sort of business.

I am not suggesting that the Internal Revenue Service was trying to trap anybody, but I am suggesting to you that it is the duty of this court to advise you about these things, and that I am doing. I am not going to take any testimony from you until you have an opportunity to consult with counsel. This first witness who was on the stand said he had already admitted it, he had already made his admissions, and he said they had already been advised. By this man sitting at the desk, I suppose. He [fol. 21] is the one who wrote a note to the attorney telling him they had been advised, already been advised, I suppose.

Well, whether that advice to you was adequate to meet the standards of the Miranda case and the Escobedo case in the Supreme Court of the United States and the still more recent case is something only a lawyer can tell you.

So this case is vacated, setting is vacated this afternoon, and it will be calendared again; and, before it is calendared again, I am going to have these witnesses in and talk to them again before I will permit them to testify.

* * * *

CERTIFICATE

I, Lucille Hallam, Official Reporter, United States District Court, District of Utah, do hereby certify that the foregoing is a true and correct transcript of proceedings in the above-entitled matter.

DATED at Salt Lake City, Utah this twenty-seventh day of February, 1969.

_____

Official Reporter

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

No. CR-9-68

Filed Nov. 12, 1968

UNITED STATES OF AMERICA, PLAINTIFF

vs.

MILTON C. JORN, DEFENDANT

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE INFORMATION ON THE GROUND OF ONCE IN JEOPARDY

FACTS

The present action against defendant was filed on November 15, 1967, charging defendant with twenty-five counts of aiding and abetting in the preparation of false and fraudulent income tax returns. The matter reached this court for trial on August 27, 1968 at which time a jury was impanelled. After the jury was impanelled the government moved to dismiss fourteen counts of the original information. The motion was granted and plaintiff pleaded not guilty to the eleven remaining counts of the amended information. Thereafter the jury was returned to the jury box and the government commenced to put on its case.

The government's first witness, Joel A. Jensen, was sworn and testified and plaintiff's Exhibits 1 through 11 were marked and received. Thereafter the government called Mr. Michael R. Linnell as its second witness. Mr. Linnell was sworn. At this point counsel for defendant pointed out to the court that it was his feeling that each of these taxpayer-witnesses should be warned as to his constitutional rights before testifying because it was felt

there was a possibility they could be incriminating themselves. (See Excerpt from Proceedings, page 2).

Thereupon the court proceeded, in the presence of the jury, to point out to the witness his constitutional rights with regard to self-incrimination. The court pointed out that the witness had a right to remain silent, and he had a right to consult with an attorney, and that if he could not afford an attorney one would be furnished to him by the court. After this warning the following dialogue between the court and the witness occurred:

> THE COURT: Well, what do you want to do?
>
> THE WITNESS: Your Honor, my wife and I have had it pointed out that our returns have information in them that we know is wrong, and we have admitted this, and I would admit it farther in this court.
>
> THE COURT: Have you talked to a lawyer?
>
> THE WITNESS: No, sir.
>
> THE COURT: I am not going to let you admit it any further in this court. That is all there is about that. The admissions you have already made were very likely obtained from you without telling you want your constitutional rights are.
>
> THE WITNESS: No, sir.
>
> THE COURT: What is that?
>
> THE WITNESS: We were advised at the time we were first contacted by the Internal Revenue Service.
>
> THE COURT: If you were, you are the only taxpayer in the United States that has been so advised, because they do not do that when they first contact you. They don't do that. What they do is this: They send an agent around to check your books, and he doesn't tell you about those things. They don't start telling you what we are talking about here until they decide there should be a criminal prosecution and they are about to present the matter to that department of the Internal Revenue Service that investigates the possibility of a criminal prosecution.

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THE COURT: Do you know what they say to them? You haven't been in here. We have had cases in here, and it is very rare that the warnings they give meet the decisions of the Supreme Court of the United States that have been recently handed down. The Supreme Court has been spelling this out very recently, and it has been unusual that the agents, not just Revenue Agents, but the Treasury agents, FBI agents—it has been very rare in here that they have warned the individual properly.

If we have this kind of a situation, I would want to permit counsel to voir dire the witness—each one of them—on whether he was warned properly or whether he wasn't warned properly.

I don't think we ought to take sworn testimony from these people who stand in very good shape to get prosecuted here. You prosecute this man, and the first thing you know you will be in here prosecuting all these witnesses.

MR. WETZEL: Your Honor, the testimony will show that they were not aware what was in these—these falsities.

THE COURT: Now, Mr. Wetzel, you know that is no defense to a criminal charge.

MR. WETZEL: Your Honor, under this section it has to be knowingly and wilfully.

THE COURT: That is right, but when they put their signatures to an income tax return, they can't escape full civil and criminal responsibility, if that is a false return, by saying "Oh, I didn't know it was illegal." This involves taking deductions.

One case, I have already mentioned, I note the taxpayer claimed $90 donation to the Church, and he made only $75 donation to the Church. I think that is pretty small stuff, but you multiply that by a number of cases, and it amounts to something.

Now, do you mean to tell me that the fellow who prepared the tax return cooked that up out of his own head, and the taxpayer didn't know what he was doing when he put that $90 down?

MR. WETZEL: Yes, sir, that is precisely it. We have a more flagrant example, like 179—

THE COURT: Well, I will tell you what is going to happen in this case:

Ladies and gentlemen, it won't be necessary for you to attend the court any further on this matter. I am going to excuse you permanently, as I have the rest of the jury, with the thanks of the court for your coming here and helping us in these matters.

(Excerpt From Proceedings pages 2 through 8)

THE UNDISPUTED FACTS SHOW THAT DEFENDANT WAS ONCE IN JEOPARDY ON THE AMENDED INFORMATION AND THE LAW IS CLEAR THAT HE CANNOT NOW BE TRIED AGAIN ON THE SAME CHARGES.

The above quote from the record of the proceedings amply illustrates defendant's position. The prosecutor in the case was not prepared to go on with the trial. His witnesses had not been properly prepared and properly warned so that they could testify in the matter. Therefore the court vacated the trial setting. It is obvious from the record in the case that the vacated trial setting *was to the express benefit of the prosecution* and to the prejudice of defendant.

The *Miranda* [*Miranda* v. *Arizona* 384 U.S. 436 (1966)] and *Escobedo* [*Escobedo* v. *Illinois* 378 U.S. 478 (1964)] decisions have been the law in this country since 1966 and 1964 respectively. The prosecution was well aware of these cases and should have adequately prepared its witnesses so that they could testify. Having failed to do so, the prosecution cannot now take advantage of the vacated trial setting to make such preparation and hence once more impanel a jury and place defendant once more in jeopardy.

(a) *Jeopardy attaches when the jury is sworn and evidence is taken by a court of competent jurisdiction.* The cases are clear as to when jeopardy attaches. The United States Supreme Court in the case of *Green* v. *United States*, 355 U.S. 184, 188 (1957) stated:

> Moreover it is not even essential that a verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar second trial on the same charge. *This court, as well as most others, has taken the position that a defendant is placed in jeopardy once he is put on trial before a jury so that if the jury is discharged without his consent he cannot be tried again.* (Emphasis added).

(b) *The effect of the attachment of jeopardy and the discharge of the jury is to prevent retrial.* In the majority of cases once jeopardy attaches and the jury is dismissed, the defendant may not be retried for the same crime. *E.g. Downum* v. *United States*, 372 U.S. 735 (1963); *Cornero* v. *United States*, 48 Fed. 2d 69 (9th Cir. 1931). Such a result has been especially true when the cause for the dismissal of the jury has been traced to the prosecution, since one of the purposes of the Fifth Amendment prohibition against double jeopardy has been to prevent "harrassment of an accused by successive prosecution . . . so as to afford the prosecution a more favorable opportunity to convict . . ." *Downum* v. *United States*, 372 U.S. 734, 736 (1963); *Waters* v. *United States*, 328 F 2d 739 (10th Cir. 1964).

Thus in the *Downum* case where the prosecutor did not have his witnesses present in court and ready to testify at the conclusion of the impanelling of the jury,

the court held that jeopardy had attached and that there was no reason for allowing a retrial of the defendant. In the *Cornero* v. *United States, supra*, the district attorney was not prepared to go forward with his witnesses after the jury was impanelled. This was due to the fact that some of his witnesses had not appeared in court. However, the district attorney had not subpoened these witnesses and the court made the following statement:

> There is no difference in principle between a discovery by the district attorney immediately after the jury was impanelled that his evidence was insufficient and a discovery after he had called some or all of his witnesses. *It is uniformly held that, in the absence of sufficient evidence to convict, the district attorney cannot by any act of his deprive the defendant of the benefit of the constitutional provision prohibiting a person from being twice put in jeopardy for the same offense. Cornero* v. *United States, supra* at 71. (Emphasis added).

Thus the court refused to allow a retrial.

There are some cases in which the jury has been discharged and a retrial has been allowed. This is in the sound discretion of the court. However, the Supreme Court in the *Downum* case stated:

> The discretion to discharge the jury before it has reached a verdict is to be exercised "only in very extraordinary and striking circumstances,". *Downum* v. *United States, supra* at 736.

These striking circumstances referred to by the court in the Downum case are set forth in several other cases decided by the United States Supreme Court. In the case of *Wade* v. *Hunter*, 336 U.S. 684, 688 (1949) the Supreme Court stated:

> The double jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an in-

superable obstacle to the administration of justice in many cases in which there is no semblance of the type of *oppressive practices* at which the double jeopardy prohibition is aimed. *There may be unforeseeable circumstances that arise during a trial making its completion impossible, such as the failure of a jury to agree on a verdict.* In such event the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again and *there have been instances where a trial judge has discovered facts during a trial which indicated that one or more members of the jury might be biased against the Government or the defendant.* It is settled that the duty of the judge in this event is to discharge the jury and direct a retrial. (Emphasis added).

The court in the *Wade* case went on to deny the plea of double jeopardy based upon facts which showed that completion of the first trial was made impossible by the exigencies of war. (the case was a military court martial case). All of the jury cases which have allowed retrial have been cases in which, either a juror was shown to be prejudiced, or in which the defendant had asked for the continuance, or in which the continuance was made by the court in order to protect rights of a defendant, or in which the continuance or discharge of the jury was made necessary by unforeseeable circumstances. See *E.g. Wade* v. *Hunter, supra; Gori* v. *United States*, 367 U.S. 364 (1961); *Brock* v. *North Carolina*, 344 U.S. 424 (1953).

The facts in the instant case as set forth above, place it squarely within the *Cornero* and *Downum* rules. Both of those cases were cases in which the prosecution was not prepared to go forward with evidence sufficient to convict, and therefore the court discharged the jury. In both cases the courts held that no retrial could be had since the defendant had been once placed in jeopardy. *In both of these cases the court held that the lack of proper preparation by the prosecution does not justify a retrial.*

In the instant case the prosecution was well aware of the *Miranda* and *Escobedo* decisions requiring constitutional warnings to be given prior to the taking of incriminating statements. The transcript of the preliminary hearing in this matter clearly points out the possibility of incrimination on the part of these witnesses. (See for instance Tr. 135, 147, 214). Therefore, the prosecution should have given these witnesses proper *Miranda-Escobeda* warnings and should have allowed them to consult counsel prior to the trial of this matter.

CONCLUSION

In the instant case, the jury was impanelled and evidence was taken. Jeopardy attached. The fact that these witnesses were not allowed to testify simply indicates that the prosecution was not prepared to go forward with its case. When the jury was discharged by the court, it was no less than an acquittal of the defendant on those charges and he cannot now be retried.

Dated this 11th day of November, 1968.

Respectfully submitted,

/s/ Denis R. Morrill
DENIS R. MORRILL
Attorney for Defendant

MAILING CERTIFICATE

I hereby certify that a copy of the foregoing was mailed to Frank T. Wetzel, U. S. Attorney, Post Office Building, Salt Lake City, Utah, 84110, this 11th day of November, 1968.

/s/ Denis R. Morrill
DENIS R. MORRILL

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

CR-9-68

Filed In United States District Court, District of Utah, Time: Nov. 12, 1968, Andrew John Brennan, Clerk

UNITED STATES OF AMERICA, PLAINTIFF

vs.

MILTON C. JORN, DEFENDANT

PLAINTIFF'S MEMORANDUM ON FORMER JEOPARDY

BACKGROUND:

Upon commencement of trial after the jury had been impaneled and sworn, the government produced a witness for the purpose of laying a foundation for admission of income tax returns. The Court suggested, and defense counsel agreed, that a stipulation would facilitate this matter, and that matter was so stipulated.

The next government witness was then called to the stand. Before he testified, however, defense counsel inquired of the Court if this witness was aware of the danger of self-incrimination and his constitutional rights incident thereto. The witness replied that he had been informed of his rights but had not consulted an attorney. At this juncture the Court ordered a continuance, dismissed the jury and indicated the trial should not proceed until said witness, and the rest of the prosecution's witnesses, had consulted counsel.

ISSUE:

Under the circumstances present in this case, will a plea by defendant of former jeopardy be sustained as a bar to further prosecution?

DISCUSSION:

The proper form of the defense plea is former or double jeopardy. This is so because double jeopardy re-

fers not to being punished twice, but against being twice put in jeopardy of conviction for the same offense. See *Waters* v. *United States*, 328 F.2d 739 (CA 10, 1964).

The basis of protection from double jeopardy may emanate from either of two constitutional sources: (1) the due process clause of the 14th Amendment; (2) The Fifth Amendment. The 14th Amendment due process clause has been construed to apply double jeopardy prohibitions toward state prosecutions. This constitutional limitation has not come from the 5th Amendment, however, but from a "concept of ordered liberty," as the due process clause does not specifically apply to the states any of the provisions of the first eight amendments as such. See *Barkus* v. *Illinois*, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684, rehearing denied 360 U.S. 907, 79 S.Ct. 1283, 3 L.Ed.2d 1258 (1959). The Supreme Court in *Cichos* v. *Indiana*, 385 United States 76, 17 L.Ed.2d 175, 87 S.Ct. 271 (1966), recently granted certiorari on the single question of whether the 5th Amendment double jeopardy prohibition is applicable to the states through the due process clause, but that Court later dismissed the writ on that question alone as improvidently granted, and otherwise disposed of the case. As it now stands, double jeopardy is applied to the states not as part of the 5th Amendment, but as a concept "implicit in ordered liberty" through the 14th Amendment. This distinction may be important for two reasons. (1) The Supreme Court has hesitated to apply the 5th Amendment double jeopardy concept to the states. It evidently has not wanted to be bound by 5th Amendment decisions concerning double jeopardy. (2) The one case closely in point is a state case applying the "ordered liberty" concept rather than a federal case dealing with the 5th Amendment.

The traditional view is that once a jury has been sworn and impaneled defendant has been put in jeopardy and so the state must continue its case to a conclusion or hold him harmless for that offense. This general principle, however, is subject to the rule of reason; if cogent reasons exist justifying a continuance or later trial and the defendant has not been materially prejudiced, the 5th Amendment double jeopardy clause has been held not to have been then violated.

The Fifth Circuit case of *Downum* v. *United States*, 300 F.2d 137 (1962) held that double jeopardy did not attach when a government witness failed to appear at trial. The Supreme Court in a five to four decision reversed, 372 United States 734, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1962), because no "extra-ordinary and striking circumstances" existed. The Court held that since the prosecution witness had not been served with summons and no other arrangements had been made to insure his presence, no compelling circumstances existed to warrant a continuance; therefore, double jeopardy applied. The Supreme Court in *Downum* cited *Cornero* v. *United States*, 48 F.2d 69 (CA 9, 1931) with approval; the four dissenters argued that the *Cornero* standard was too harsh and that in *Wade* v. *Hunter*, 336 United States 684 (1949), the Court had previously rejected it.

The *Downum* Supreme Court majority, however, did purport to follow its just-prior decision in *Gori* v. *United States*, 367 United States 364, 81 S.Ct. 1523, 6 L.Ed.2d 901, rehearing denied 368 United States 870, 82 S.Ct. 25, 7 L.Ed. 70 (1961). The facts of this case (also a five-four decision) concerned a mistrial prematurely declared by an over-zealous judge when he felt the prosecution was attempting to inform the jury of other crimes of the accused. The Court stated:

> "Where, for reasons deemed compelling by the trial judge, who is best suited intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment. *Simmons* v. *United States*, 142 United States, 148; *Logan* v. *United States*, 144 U.S. 263; *Dreyer* v. *Illinois*, 187 United States 71, 85-86. It is also clear that 'This Court has long favored the rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will be best served. . .' Brock v. North Carolina,[9] 344 United

[9] *Brock* v. *North Carolina* was a state prosecution and therefore arose, of course, under the Due Process Clause of the Fourteenth

> States, 424, 427, and that we have consistently declined to scrutinize with sharp surveillance the exercise of that discretion." 367 United States 364 at 368.

The Gori case is significant because it shows a disposition by the Supreme Court to not invoke double jeopardy if the reason for mistrial or continuance is not to cover the prosecution's mistakes or facilitate defendant's conviction. It is also significant that *Brock* v. *North Carolina, supra,* was there cited even though a state prosecution, because the refusal in *Brock* of prosecution witnesses to testify was not realy a matter of fault; a mistrial in that case was, therefore, upheld as not double jeopardy.

The *Brock* case, *supra,* although not controlling, is closely analogous to the facts of the instant problem. In that case two of the state's witnesses refused to testify because their answers might tend to incriminate them. The defendant was later tried before a second jury and convicted. The *Brock* court stated:

> "Justice to either or both parties may indicate to the wise discretion of the trial judge that he declare a mistrial and require the defendant to stand trial before another jury. As in all cases involving what is or is not due process, so in this case, no hard and fast rule can be laid down." 344 United States 424, 427.

In the instant case, no fault could be attributed to the prosecution. The prosecution's witnesses had been served by subpoena, were present and prepared to testify. The prosecution did not request a continuance and the defense expressed no objection to the Court's dismissing the jury. In response to the defense's request that the witnesses be adequately warned of their constitutional rights, the initiative was taken entirely by the Court in its discretion to do substantial justice to not only the parties, but also other persons involved in the action whose interests might be harmed. Even the *Downum* case, *supra,* recognized

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Amendment. The passage quoted from Brock, however, related to the application in federal prosecutions of the double jeopardy provision of the Fifth."

that compelling circumstances would warrant a continuance or new trial.

CONCLUSION:

Under these circumstances, plaintiff asserts that the Court's action in dismissing the jury is within the sound judicial discretion of the Court, the defendant has not been prejudiced by such action and defendant's plea of former jeopardy cannot be sustained.

Respectfully submitted.

WILLIAM T. THURMAN
United States Attorney

By F. T. WETZEL
F. T. WETZEL
Assistant United States Attorney

Attorneys for Plaintiff
United States of America

Address:

200 U. S. Post Office and Court
House Building, 350 So. Main
Salt Lake City, Utah 84101

On this 12th day of November, 1968, I mailed a copy of the above and foregoing Plaintiff's Memorandum on Former Jeopardy to Dennis R. Morrill, Esquire, Attorney at Law, 206 El Paso Natural Gas Building, Salt Lake City, Utah, Attorney for Defendant.

/s/ Lucy S. Taylor
Secretary

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

No. CR-9-68

UNITED STATES OF AMERICA, PLAINTIFF

vs.

MILTON C. JORN, DEFENDANT

ORDER DISMISSING INFORMATION

This matter having come on for hearing before the Honorable Willis W. Ritter, Chief Judge, United States District Court, for the District of Utah, Central Division, pursuant to defendant's Motion to Dismiss on the Grounds of Once in Jeopardy, Frank T. Wetzel appearing for the United States Attorney and Denis R. Morrill appearing for the defendant, Milton C. Jorn, and the court being fully apprised in the matter, makes the following order:

IT IS HEREBY ORDERED that the amended information in the case CR-9-68 filed by the United States of America on the 19th day of August, 1968, and amended on the 27th day of August, 1968, is hereby dismissed, pursuant to defendant's motion, on the ground of former jeopardy.

Dated this 9th day of January, 1969.

/s/ Willis W. Ritter
WILLIS W. RITTER,
Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Criminal No. CR-9-68

Filed In United States District Court, District of Utah,
Time: Feb. 7, 1969, Andrew John Brennan, Clerk

UNITED STATES OF AMERICA, PLAINTIFF

vs.

MILTON C. JORN, DEFENDANT

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that the United States appeals to the Supreme Court of the United States from the order of January 9, 1969, dismissing the information which charged the defendant with violating 28 U.S.C. 7206(2).

This appeal is taken pursuant to 18 U.S.C. 3731.

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include therein the following:

(1) Transcript of docket entries;

(2) Information filed February 23, 1968;

(3) Order dated August 27, 1968 dismissing certain counts of the information;

(4) Amended information filed August 27, 1968;

(5) Transcript of trial proceedings of August 27, 1968;

(6) Defendant's motion to dismiss information on the ground of double jeopardy and memorandum in support thereof;

(7) Plaintiff's memorandum on former jeopardy;

(8) Order dated January 9, 1969, dismissing the information;

(9) This notice of appeal.

III. The following question is presented by this appeal:

The first trial resulted in a discharge of the jury after the defense had raised the question of whether the Government had advised its witnesses of their privilege against self-incrimination and—in the judge's opinion—they had not been fully so advised. The question presented is whether in these circumstances the later order dismissing the information on the ground of double jeopardy was proper.

Dated at Salt Lake City, Utah, this 7th day of February, 1969.

WILLIAM T. THURMAN
United States Attorney

By F. T. WETZEL
F. T. WETZEL
Assistant United States Attorney

Attorneys for United States of America, Plaintiff

This is to certify that a copy of the foregoing Notice of Appeal has been mailed to Denis R. Morrill, Esq., Attorney at Law, 206 El Paso National Gas Building, Salt Lake City, Utah, 84111, attorney for defendant, this 7th day of February, 1969.

LUCY S. TAYLOR
Secretary

SUPREME COURT OF THE UNITED STATES

No. 84, October Term, 1969

UNITED STATES, APPELLANT

v.

MILTON C. JORN

APPEAL from the United States District Court for the District of Utah.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

October 13, 1969

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 388838 288

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CITATIONS

369-393—69——1

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 84

UNITED STATES OF AMERICA, APPELLANT

v.

MILTON C. JORN

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The order of the district court dismissing the information on the ground of double jeopardy (A 60) is not reported. Excerpts from the proceedings at the aborted trial are reproduced in the Appendix at pp. 33–46.

JURISDICTION

The order of the district court dismissing the information was entered January 9, 1969. Notice of appeal to this Court was filed in the district court on February 7, 1969 (A 61–62). The jurisdictional statement was filed April 9, 1969, and this Court noted probable jurisdiction October 13, 1969 (A 63). The jurisdiction of this Court to review, on direct appeal,

a judgment dismissing an information on the ground of double jeopardy is conferred by 18 U.S.C. 3731. *United States* v. *Tateo,* 377 U.S. 463, 465; cf. *United States* v. *Blue,* 384 U.S. 251, 253–254.

QUESTION PRESENTED

Whether the constitutional prohibition of double jeopardy bars retrial of a defendant whose first trial was ended when the trial judge dismissed the jury which had been sworn, upon concluding that prosecution witnesses had not been adequately warned of their constitutional right not to incriminate themselves.

STATEMENT

Appellee was charged in February, 1968, on a twenty-five count information alleging that he had willfully assisted numerous individual taxpayers to prepare fraudulent income tax returns in which the claimed deductions were overstated, in violation of 26 U.S.C. 7206(2) (A 1–21). He was brought to trial in the United States District Court for the District of Utah on August 27, 1968, and twelve jurors were chosen and sworn (A 34). Then, out of the presence of the jury, the government moved to dismiss fourteen of the counts charged, and to substitute an amended, eleven count information. *Ibid.* In response, the trial judge suggested that the information as filed appeared to be "a whole bundle of two-bit stuff" which the government might wish to dismiss in its entirety if it had more time to consider the matter (*ibid.*), that the government might need more time for investigation, so that trial should not proceed (A 35), and that the defendant might wish time to

respond to the amended information (A 37). None of these suggestions was taken up, the amended information was filed, and appellee pleaded not guilty to each of its eleven counts. *Ibid.* The jury then returned. The government's first witness, an Internal Revenue Service official, was called to identify the income tax returns at issue and they were received in evidence (A 38–40).

The principal witnesses for the government were to have been some of the taxpayers whom appellee was said to have assisted. When the first was sworn, defense counsel objected that "each of these taxpayers should be warned as to his Constitutional rights before testifying * * *" (*ibid.*). The trial judge advised the witness that he was not required to respond until he had consulted his attorney, whose advice could be very important; that he need say nothing, because it was the government's burden to produce evidence of guilt "and the Fifth Amendment means that the Government cannot get the evidence to convict you from your own mouth"; that a lawyer would be appointed for him if he could not afford one, and that the government was "not entitled to interrogate you about anything if you don't want them to" (A 40–41). The court then continued:

> * * * Well, what do you want to do?
>
> The WITNESS. Your Honor, my wife and I have had it pointed out that our returns have information in them that we know is wrong, and we have admitted this, and I would admit it further in this court.
>
> The COURT. Have you talked to a lawyer?

The WITNESS. No, sir.

The COURT. I am not going to let you admit it any further in this court. That is all there is about that. The admissions you have already made were very likely obtained from you without telling you what your Constitutional rights are.

The WITNESS. No, sir.

The COURT. What is that?

The WITNESS. We were advised at the time we were first contacted by the Internal Revenue Service.

The COURT. If you were, you are the only taxpayer in the United States that has been so advised, because they do not do that when they first contact you. * * * [A 41–42.]

The court instructed the witness to step down and asked whether all the government's witnesses were similarly situated. The Assistant United States Attorney responded that only Jorn, not the taxpayers, had been suspects in the criminal investigation but that, in accordance with local practice, the *Miranda* warnings had been given. The court expressed strong doubt whether any warnings that had been given were proper, and stated that he thought testimony should not be taken from "people who stand in very good shape to get prosecuted" themselves (A 42–43). The prosecutor replied to this that "the testimony will show that [the taxpayer-witnesses] were not aware what was in these—these falsities." The court found

this answer inadequate, and, interrupting the prosecutor's defense of the government's actions, permanently excused the jury. He then called all the taxpayer witnesses before him and warned them all as he had the first, again stressing particularly the need to see an attorney before deciding whether to testify; he said he would not let them testify until they had done so and he had talked to them again (A 43–46).

Although in this colloquy the judge spoke as if he contemplated that the case would be calendared again (A 46), a few months later he granted a defense motion for dismissal of the prosecution on the ground of double jeopardy (A 60).

SUMMARY OF ARGUMENT

The question in this case—one which has been before this Court several times in recent years—is under what circumstances a defendant whose trial has been interrupted by mistrial may be retried consistent with the Fifth Amendment's guarantee against double jeopardy. Relying principally on this Court's three most recent opinions touching that problem, *Gori* v. *United States,* 367 U.S. 364, *Downum* v. *United States,* 372 U.S. 734 and *United States* v. *Tateo,* 377 U.S. 463, we show that this Court has adhered to a rule of discretion, in which retrial is not barred if "there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed." *Wade* v. *Hunter,* 336 U.S. 684, 688–689. That is, the question of retrial is to

be answered in the circumstances of each case upon examination of whether the prosecution has been unfairly aided or the defense has been harassed by the particular mistrial ordered.

Since here the proceedings leading to the discharge of the jury were begun when defense counsel asked that the taxpayers be warned, this case is close to if not actually in the category of cases where the defendant himself has sought mistrial. While counsel never made plain what kind of warning he thought should be given, his request invited the judge to do whatever the judge considered to be necessary and thus acquiesced in the discharge. A mistrial upon the defendant's request, of course, would not bar retrial except in the most unusual circumstances of provocation by the prosecution or the court—circumstances utterly lacking here.

Moreover, even if the defendant cannot be said to have sought this mistrial, the mistrial was granted for his advantage, not the prosecution's. The warnings given could only have inhibited adverse witnesses from testifying; the government was at all times ready to proceed. If the government was required to warn its witnesses of their Fifth Amendment rights before trial, the record shows that it did so; if a warning was required at trial, the government cannot be blamed for not having given it previously and the judge's strong words sufficed without any need for

discharge of the jury. Indeed, since appellee could not have asserted the witnesses' Fifth Amendment rights as a reason for reversal on appeal had the court refused to give the requested warning, it cannot be said that the government was aided by the mistrial.

These facts readily distinguish this case from *Downum, supra,* the only case in which this Court has held retrial to be barred after mistrial; in *Downum* the government sought the mistrial because its witness was missing, which would have prevented it from proving its case. The circumstances here, rather, are like those in *Gori* and *Tateo.* Although the court was mistaken in ordering the mistrial, it nonetheless acted in the interest of what it conceived to be substantial justice.

It would not further the cause of justice to hold that all errors in granting mistrial, even those which do not favor the government, entitle a defendant to escape without trial. Such a ruling would discourage conscientious judges from granting mistrial in circumstances admitting even the slightest doubt, and might appear to grant to others an arbitrary license to acquit. A mistrial granted in the interests of justice, not to favor the prosecution or harass the defense, does not render a retrial unfair so as to offend the prohibition against double jeopardy.

369-393—69——2

ARGUMENT

I. UNDER THIS COURT'S CASES, A MISTRIAL FORECLOSES FURTHER PROSECUTION ONLY IF IN ALL THE CIRCUMSTANCES IT UNFAIRLY AIDS THE PROSECUTION OR HARASSES THE DEFENSE

This case presents the question under what circumstances a defendant whose trial has been interrupted by mistrial may be retried consistent with the Fifth Amendment's guarantee against double jeopardy. This question was twice before this Court in recent years. *Gori* v. *United States,* 367 U.S. 364; *Downum* v. *United States,* 372 U.S. 734.

The historical antecedents bearing on this issue were fully set out in the government's briefs in *Gori* and *Downum,* No. 486, October Term, 1960, and No. 489, October Term, 1962, and we think it would serve no useful purpose to repeat them at length here. It is enough to remember that the question of retrial after a mistrial arose in different historical circumstances than the issue of retrial after acquittal or conviction, and, initially, the double jeopardy clause was thought to apply only to the latter. Mistrial was treated as a matter of discretion. See *United States* v. *Perez,* 9 Wheat. 579, 580:

> the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. * * * To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes

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ns v. *United States*, 142 U.S. 148, 153–154;
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; *Green* v. *United States*, 355 U.S. 184, 188;
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case to determine whether the retrial vio-
underlying "intent" of the Fifth Amend-
Wade v. *Hunter*, 336 U.S. at 688–689, the

Court, in an opinion by Mr. Justice Black, noted that the Fifth Amendment:

> * * * does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. * * * [A] defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments.

Read together, we believe that the Court's most recent decisions, *Gori, Downum* and *United States* v. *Tateo*, 377 U.S. 463, confirm this analysis, and show that retrial was improperly denied here.

In *Gori*, the district court of its own motion had withdrawn a juror when, rightly or wrongly, it became convinced that the Assistant United States Attorney's examination of a government witness was leading to the introduction of incompetent evidence creating suspicion whether the defendant had committed other offenses than the one with which he was charged. Record, No. 486, October Term, 1960, p. 14. The prosecutor had not sought the mistrial, nor was there any indication that he had intentionally provoked one to abort a trial which he might have feared was going badly for him. Rather, this Court found it "unquestionable * * * that the order was the product of the trial judge's extreme solicitude—an overeager solicitude, it may be—in favor of the accused." 367

U.S. at 367. Reviewing the prior cases, the Court found it settled that (367 U.S. at 368)

> Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to to make such a decision, the ends of substantial justice cannot be obtained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment.

Putting aside for the future cases in which prosecutors instigated or judges granted mistrials for the purpose of harrassment or to avoid probable acquittal, the Court endorsed the rule of discretion it first stated in *Perez*. The Court was "unwilling, where it clearly appears that a mistrial has been granted in the sole interest of the defendant, to hold that its necessary consequence is to bar all retrial," fearing thus to "make [trial judges] unduly hesitant conscientiously to exercise their most sensitive judgment—according to their own lights in the immediate exigencies of trial—for the more effective protection of the criminal accused." 367 U.S. at 369–370. It thus found reprosecution not barred.

Two Terms later, in *Downum*, this Court confronted the facts missing in *Gori*. There, the prosecutor had been the moving force in seeking mistrial,[1] and he did so because if forced to continue the trial he would have been unable to present sufficient evidence to

[1] This circumstance would not be a barrier to retrial in all cases—for example where the prosecution has uncovered evidence of a biased or tampered jury. See, *e.g. Simmons* v. *United States*, *supra*.

convict Downum of certain of the offenses charged against him; a crucial witness was missing. Mistrial was granted to help the government prove its case. The four dissenters from *Gori,* joined by Mr. Justice Goldberg, held in these circumstances that the double jeopardy clause prevented reprosecution. Their opinion again reviewed the prior cases, concluding "that there are occasions when a second trial may be had although the jury impaneled for the first trial was discharged without reaching a verdict and without the defendant's consent." 372 U.S. at 735–736. It stressed, however, the limitation on the trial court's discretion to discharge a jury before verdict, which it characterized as one "to be exercised 'only in very extraordinary and striking circumstances.'" *Ibid. On the record before it,* 372 U.S. at 737, the Court accepted the reasoning of an earlier Ninth Circuit decision, *Cornero* v. *United States,* 48 F. 2d 69, that

> The situation presented is simply one where the district attorney entered upon the trial of the case without sufficient evidence to convict. This does not take the case out of the rule with reference to former jeopardy.

Tateo, decided the next Term, was not a case involving mistrial. There, upon improper urging by the trial judge, a defendant had interrupted his trial to plead guilty, and the issue was whether, having obtained vacation of the sentence then imposed because of the improprieties involved, he could be retried. Six members of the Court held that he could be retried, upon an analogy to the situation which would have existed had a mistrial been ordered as a result

of the impropriety. In so doing the opinion carefully noted that *Downum* was a case where mistrial had been procured by the prosecution because it was not ready to go forward with its case, and reiterated the holding of *Gori* that a second trial was proper "after the original trial judge declared a mistrial on the ground of possible prejudice to the defendant, although the judge acted without defendant's consent and the wisdom of granting a mistrial was doubtful." 377 U.S. at 467. In a cautionary footnote, the Court remarked that (377 U.S. at 468, n. 3)

> If there were any intimation in a case that prosecutorial or judicial impropriety justifying a mistrial resulted from a fear that the jury was likely to acquit the accused, different considerations would, of course, obtain.

The three dissenters, each of whom had joined the *Downum* majority, characterized the Court's opinion as a departure from *Downum,* and a return to the majority holding of *Gori.* 377 U.S. at 463 (Goldberg, J., dissenting).

As some members of the Court have noted in the several opinions, the three decisions reveal differing points of view. One case emphasizes discretion, consistently recognized by this Court since *Perez;* the next emphasizes the curbs on that discretion; and the third, the factual limitations of each of the cases involved. But, on their facts, the cases are mutually consistent. In *Downum,* the only case in which this Court has ever failed to uphold a retrial after discharge, mistrial was sought by the government and for its own advantage, as it would have been unable

to prove its case had trial proceeded. The mistrial in *Gori* and the guilty plea in *Tateo* were brought about by the judge, interceding in what he apparently thought were the defendant's best interests. This alignment is entirely consistent with the position the government has taken in all of these cases, that the question of retrial is to be answered in the circumstances of each case upon examination whether the prosecution has been unfairly aided or the defense has been harassed by the particular mistrial ordered.[2]

Nor is the issue one readily solved by the maxim that the government rather than the citizen should bear any risk of judicial arbitrariness or error in granting mistrials. To paraphrase this Court's remarks in *Tateo*, 377 U.S. at 466, it would be a high price indeed for society to pay were every accused granted immunity from punishment because of any error in granting a mistrial. Judges have no arbitrary

[2] In *Downum*, the government had argued that the dismissal differed from a simple continuance only in a technical sense, in that no witnesses had been called and the case was recalendared for trial two days later. There were arguably extenuating circumstances regarding the government's failure to have all its witnesses present, since an unusually large number of cases had been calendared for trial that week and it was unclear when any particular case would be called. The government conceded, however, that among the circumstances to be considered were "the interest of the accused that he not be put to the expense, the mental strain and the harassment of protracted litigation * * * [and] his right to be protected against dismissal in order to help the prosecution, 'at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict.'" Govt. Br., No. 489, October Term 1962, p. 30. The government argued, unavailingly in the event, that its failure to have witnesses present was not the equivalent of a failure of evidence. Compare *id.*, 33, with 372 U.S. at 737.

license to acquit. But from the standpoint of the defendant it is at least as doubtful that trial courts would be as zealous as they now are in protecting against the effects of improprieties at trial if they knew that an error in granting mistrial would put the accused irrevocably beyond the reach of further prosecution. As a result, defendants would be remitted more often to appeal, and face even more protracted proceedings in the event they succeeded, than if a mistrial had been granted in midcourse.

II. THE MISTRIAL IN THIS CASE DID NOT AID THE PROSECUTION OR HARASS THE DEFENSE, SINCE, IF IT WAS NOT ATTRIBUTABLE TO A DEFENSE REQUEST, IT WAS GRANTED SOLELY TO AID THE DEFENSE AND AGAINST THE GOVERNMENT'S INTEREST

The facts of this case bring it near, if not into, the category of cases where the defendant himself has sought mistrial. The proceedings leading to discharge of the jury were begun when defense counsel suggested that

> each of these taxpayers should be warned as to his Constitutional rights before testifying, because I feel there is a possibility of a violation of the law. [A 40].

Counsel never addressed himself to what the warning he asked for should be, or whether it required the involvement of other attorneys which in turn might necessitate a continuance or dismissal of the trial for another day. Quite possibly he thought there would be no more than a few words of admonition from the judge, and was interested only in the effect that that might

have in quieting persons he expected to be adverse witnesses against his client. Nonetheless, in asking for the warning he plainly meant the judge to do whatever the judge concluded was necessary in the circumstances—including, if that were necessary, postponement of the trial to another day, whether by mistrial or otherwise. The outcome, in other words, was plainly consistent with counsel's request; the judge was doing what he felt was required to warn the witnesses. This Court has consistently indicated that, unless provoked by the prosecution or court out of fear of acquittal, a mistrial granted on a defendant's request will never foreclose retrial. *E.g., United States* v. *Tateo, supra,* 377 U.S. at 467–468.

Even if the Court does not conclude that defendant can be said to have sought this mistrial, it is plain that the mistrial was granted for his advantage, not the prosecution's. The prosecution was present in court and ready to proceed. While insisting that it had previously warned the witnesses, as the witness who testified confirmed, it did not object to the extensive warning the court gave and argued to the end that it should be permitted to continue presenting its case. The warning was in effect a blunt suggestion not to testify; and the dismissal so that the witnesses could consult further with attorneys, to be followed by still further discussions with the court before it would permit them to testify (A 46), served only to drive more deeply home the plain message that it would be in the witness' best interests not to testify. The prosecution had nothing to gain from these procedures. They were of possible advantage only to the

appellee. Even if their wisdom was highly doubtful, that does not take this case out of the ambit of *Gori*, for there, too, the measures taken out of solicitude for the defense were quite possibly too extreme. 367 U.S. at 367; *United States* v. *Tateo, supra,* 372 U.S. at 467.

Appellee may argue that in fact the prosecution was aided, because its witnesses had not been properly prepared to testify in the matter. But this argument assumes that, had the court not taken the steps it did, appellee would have been entitled to have the witnesses excluded from testifying or, if that were not done, to reversal on appeal. It is, of course, entirely proper for judges to assure, for the protection of *witnesses,* that witnesses are aware of the possibly incriminatory effects of what they may say. *United States* v. *Maloney,* 262 F. 2d 535, 537 (C.A. 2); *Long* v. *United States,* 360 F. 2d 829, 833–834 (C.A.D.C.); 8 Wigmore, Evidence, § 2270. No case, however, indicates that this procedure is required for the protection of the accused, and that failure to follow it constitutes error entitling *him* to a new trial.

Whether there are consequences inhibiting future use of such testimony in criminal trials in which the witnesses themselves are defendants if proper warnings are not given, is a question this Court need not now decide. For it does not follow from the existence of such consequences that the accused is entitled to claim the benefit of this flaw. Cf. *New York* v. *Portelli and Rosenberg,* 15 N.Y. 2d 235, certiorari denied, 382 U.S. 1009; *Alderman* v. *United States,* 394 U.S. 165, 171–176. As this Court has fre-

quently stated, Fifth Amendment rights are personal rights. See *Miranda* v. *Arizona*, 384 U.S. 436; *George Campbell Painting Corp.* v. *Reid*, 392 U.S. 286; *Rogers* v. *United States*, 340 U.S. 367. It follows that defendant had no right to invoke the witness' privilege to prevent them from testifying at trial, whether or not they were properly prepared. *Long* v. *United States, supra;* 8 Wigmore, Evidence, § 2270.

In any event, the witnesses were properly prepared. Since they were neither suspects nor in custody *before* trial, no warnings were then required,[3] although in fact warnings were given (A 42). If the witnesses' presence at trial under subpoena were to be viewed as a custodial interrogation for *Miranda* purposes—itself an improper characterization[4]—it is then at trial that the *Miranda* warning would have to be given. Indeed, the judge did give a very forceful and fully adequate warning at that point. (A 40–41.) The

[3] See *Mathis* v. *United States*, 391 U.S. 1; *Orozco* v. *Texas*, 394 U.S. 324; *Spinney* v. *United States*, 385 F. 2d 908, 910 (C.A. 1), certiorari denied, 390 U.S. 921; *United States* v. *Mackiewicz*, 401 F. 2d 219, 223 (C.A. 2), certiorari denied, 393 U.S. 923; *United States* v. *Mancuso*, 378 F. 2d 612, 619, modified, 387 F. 2d 376 (C.A. 4), certiorari denied, 390 U.S. 955; *Agoranos* v. *United States*, 409 F. 2d 833, 835 (C.A. 5), certiorari denied, October 13, 1969, No. 163, this Term; *Cohen* v. *United States*, 405 F. 2d 34, 40 (C.A. 8), certiorari denied, 394 U.S. 943; *Spahr* v. *United States*, 409 F. 2d 1303 (C.A. 9), certiorari denied, October 13, 1969, No. 366, this Term; contra, *United States* v. *Dickerson*, 413 F. 2d 1111 (C.A. 7).

[4] Unlike private interrogation in chambers, a courtroom is a public place, where proceedings are fully transcribed and the presence of counsel and the presiding judge afford substantial assurance that Fifth Amendment rights will be respected. To these circumstances, the concerns which underlay *Miranda* are largely inapplicable.

prosecutor is not to be faulted for not having given this warning earlier, for under the hypothesis that the trial constitutes the custodial interrogation, the need to warn does not earlier mature. Finally, nothing in *Miranda* requires, as the trial judge appeared to conclude (A 41, 46), that the interrogated person *must* confer with a lawyer before "responding" to "interrogation." It sufficed that after having been warned and told he might (indeed, should) consult counsel, the witness here responded that he wished to testify nonetheless (A 41; 384 U.S. at 475, 478).

In sum, the mistrial was not due to any lack of proper preparation by the prosecution. The trial judge, like the trial judge in *Gori*, acted overhastily in the interests of the witnesses and the accused. Although the court was plainly mistaken in ordering a mistrial, it nevertheless acted in the interests of what it conceived to be substantial justice. Warnings had been given, and if the judge felt that additional warnings were required, a vigorous judicial presentation, such as he gave (A. 40–46), or an overnight recess, would surely have sufficed. But judges, being human, make human errors. It would hardly further the cause of justice to hold that mere error by a judge, *ipso facto*, entitles a defendant to escape without trial. In our system, the trial judge necessarily has considerable discretion in the conduct of a trial, and in the determination of whether a mistrial should be granted. If it should be held that mere error in his conclusion as to the necessity for a mistrial, where no oppressive motive or result is shown, nevertheless bars further trial, the results could well be detrimental to

justice. A conscientious and fair-minded trial judge would feel required to resolve any doubts in favor of the government since an error against the defendant would result in an acquittal in fact. On the other hand, a capricious judge could grant a defendant the benefits of a judgment of acquittal without purporting to do so and without having the possibility of this action questioned. In short, the mere fact that the trial judge here—as in *Gori*—was probably wrong when, in effect, he declared a mistrial in the interests of justice, does not render a retrial unfair so as to offend the prohibition against double jeopardy.

CONCLUSION

It is respectfully submitted that the order dismissing the indictment should be vacated and this cause remanded to the district court for trial.

ERWIN N. GRISWOLD,
Solicitor General.
JOHNNIE M. WALTERS,
Assistant Attorney General.
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NOVEMBER 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. ~~84~~ 19

UNITED STATES OF AMERICA,

Appellant,

vs.

MILTON C. JORN.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

BRIEF FOR MILTON C. JORN, APPELLEE

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SUBJECT INDEX

CITATIONS

IN THE SUPREME COURT OF THE UNITED STATES

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No. 84

UNITED STATES OF AMERICA,

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MILTON C. JORN.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR MILTON C. JORN, APPELLEE

Opinion Below

The order of the district court dismissing the information on the ground of double jeopardy is not reported, but is set forth in the Appendix at page 60. A transcript of the proceedings at the trial is reproduced in the Appendix at pages 33-46.

Jurisdiction

The order of the district court dismissing the information was entered January 9, 1969 (A 60). The Notice of Appeal to this Court was filed in the district court on February 7, 1969 (A 61-62). The jurisdictional statement

was filed on April 9, 1969, and the Court noted probable jurisdiction on October 13, 1969 (A 63). The Government alleges jurisdiction of this Court to review, on direct appeal, "a judgment dismissing an information on the ground of double jeopardy" pursuant to 18 U.S.C. 3731 (Br. 1-2). The Government has misconstrued the statute. That statute states that an appeal may be had from an order "sustaining a motion in bar, when a defendant *has not been put in jeopardy*". 18 U.S.C. 3731. (Emphasis added.) It is submitted that this Court has no jurisdiction to hear this appeal because the defendant *has* been put in jeopardy and hence an appeal cannot be taken based upon 18 U.S.C. 3731. Since the issue presented with regard to jurisdiction and the issue presented by the merits of the case are identical (whether the defendant was in jeopardy), a statement of the basis for defendant's assertion that a direct appeal does not lie in this case will not be set forth here but will be stated in the argument, *infra*.

Questions Presented

1. Whether in a criminal case the United States Government can pursue a direct appeal to the Supreme Court pursuant to 18 U.S.C. 3731 where the trial court has sustained a motion of defendant to dismiss on the ground of double jeopardy after defendant's first trial was terminated when the judge discharged the jury after evidence had been taken, upon concluding that the prosecution witnesses could not be allowed to testify because they had not been adequately warned of their Constitutional rights not to incriminate themselves.

2. Whether the Constitutional prohibition against Double Jeopardy prevents retrial of a defendant whose first trial was ended when the trial judge dismissed the jury which had been sworn, after evidence had been taken, upon concluding that prosecution witnesses could not be allowed to testify because they had not been adequately warned of their Constitutional rights not to incriminate themselves.

Statement

Defendant was charged on February 23, 1968, on a twenty-five count information alleging that he had wilfully and knowingly aided and assisted, counseled, procured and advised the preparation and presentation of income-tax returns which were false and fraudulent as to material matters in violation of 26 U.S.C. 7206(2) (A 1-21). He was brought to trial in the United States District Court for the District of Utah on August 27, 1968, at which time twelve jurors were chosen and sworn (A 22, 34). Out of the presence of the jury, the Government moved to dismiss fourteen of the counts charged and to substitute an amended eleven-count information (A 34). The motion was granted, the amended information was filed (A 36), and defendant was arraigned on the amended information (A 37). He pleaded not guilty to each of the eleven counts. *Ibid.* The jury then returned to the courtroom and the Government's first witness, an Internal Revenue Service official, was called to identify the income-tax returns at issue and the returns were received as evidence (A 38-40).

With the exception of the Internal Revenue official through whom the income-tax returns were introduced in evidence, all of the witnesses for the Government were

taxpayers whom appellee was accused of aiding and assisting (A 34). These witnesses were in attendance at court under subpoena. When the Assistant United States Attorney called the first of these taxpayers, counsel for the defendant sought and was granted permission by the court to make the following statement:

> In view of the transcript in the preliminary hearing in this matter, it is my feeling that each of these taxpayers should be warned as to his Constitutional rights before testifying, because I feel there is a possibility of a violation of the law (A 40).

Following this statement, the court advised the witness that he was not obligated to respond until he had consulted an attorney, who "is a very important fellow in a situation like this" (A 40-41). After having fully advised the witness of his Constitutional rights against self-incrimination, the court stated:

> • • • Well, what do you want to do?
>
> The Witness: Your Honor, my wife and I have had it pointed out that our returns have information in them that we know is wrong, and we have admitted this, and I would admit it farther in this court.
>
> The Court: Have you talked to a lawyer?
>
> The Witness: No, sir.
>
> The Court: *I am not going to let you admit it any further in this court.* That is all there is about that. The admissions you have already made were very likely obtained from you without telling you what your Constitutional rights are.
>
> The Witness: No, sir.
>
> The Court: What is that?

The Witness: We were advised at the time we were first contacted by the Internal Revenue Service.

The Court: If you were, you are the only taxpayer in the United States that has been so advised, because they do not do that when they first contact you. They don't do that. What they do is: They send an agent around to check your books, and he doesn't tell you about those things. They don't start telling you what we are talking about here until they decide there should be a criminal prosecution and they are about to present the matter to that department of the Internal Revenue Service that investigates the possibility of a criminal prosecution • • • (A 41-42). (Emphasis added.)

The court would not allow the witness to testify (A 41). Upon ascertaining from the prosecutor that the remaining Government witnesses were similarly situated, the court, without notice to counsel, summarily dismissed the jury (A 43). The court then called the remaining taxpayer witnesses before him and warned them all, as he had the first, of their right to see an attorney prior to testifying. He stated that he would not let them testify until they had done so and he had talked to them again (A 45).

When the matter later appeared on the court calendar for a new trial setting, defendant's motion for dismissal of the amended information on the grounds of double jeopardy was granted (A 60).

Summary of Argument

The question presented in this case is whether, under the facts, the defendant, whose trial was interrupted when the court dismissed the jury because, in his opinion, the prosecution witnesses had not been properly prepared to testify, may be retried consistent with the Fifth Amendment guarantee against double jeopardy. Defendant will show that this Court has consistently allowed retrial *only* in cases where there was "manifest necessity" to dismiss the jury. *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579 (1824); *Simmons* v. *United States*, 142 U.S. 148 (1891); *Wade* v. *Hunter*, 336 U.S. 684 (1949); *Gori* v. *United States*, 367 U.S. 364 (1961); *Downum* v. *United States*, 372 U.S. 734 (1963); *United States* v. *Tateo*, 377 U.S. 463 (1964). There was no manifest necessity for dismissal of the jury in the instant case.

Discharge of the jury before it has reached a verdict is a discretionary matter with the trial court. However, that discretion is to be exercised "only in very extraordinary and striking circumstances," *Downum* v. *United States*, *supra*, at 736. This Court has found "manifest necessity" for dismissal of the jury and has allowed retrial under the following circumstances: Where the jury has failed to reach a verdict; where a juror was prejudiced; where the defendant sought a continuance; where continuance was granted in order to protect the rights of the defendant; and where retrial was occasioned by unforeseeable circumstances brought on by the exigencies of war. The instant case demonstrates none of these circumstances. This Court has held that the Double Jeopardy clause prevents retrial where dismissal of the original jury was caused to aid

the prosecution, or where such dismissal tends to harass or prejudice the defendant. The facts of the instant case fit squarely in this category. The jury was dismissed to prevent a directed verdict of acquittal for defendant and defendant cannot now be retried.

ARGUMENT

I.

Under the Fifth Amendment to the United States Constitution, After Jeopardy Attaches Retrial Is Allowed Only When Extraordinary and Striking Circumstances Show That There Was a "Manifest Necessity" for Dismissal of the Jury Prior to Verdict in the First Trial.

The Fifth Amendment to the United States Constitution provides, in part:

> • • • Nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb; • • •

The circumstances which will invoke the protection of this provision do not arise in every case where a jury is discharged prior to reaching a verdict. The cases are clear that retrial may be had in cases where a mistrial was requested by the defendant, or where a conviction is reversed on defendant's motion, unless such motion is provoked by improper acts of the court or prosecutor. See *e.g. Bryan* v. *United States,* 338 U.S. 552 (1949); *Forman* v. *United States,* 361 U.S. 416 (1960). In all other cases the test as to when retrial will be permitted is verbalized in terms of whether there was a "manifest necessity" for the premature termination of the initial trial in order to

protect the rights of the accused and of society. A trial, so terminated, does not bar retrial. See Note, 77 Harv. L.Rev. 1272, 1276 (1964).

The Government, in its opening brief, strongly intimates that the discharge of the jury in the instant case was caused by defendant and was in his interest (Br. 6, 15-16) and that this case should be treated as a case where mistrial was granted on defendant's motion. This is entirely incorrect. The record is clear that counsel for defendant made no motion for dismissal of the jury and was given no chance to object to the dismissal (A 40, 43-44). The obvious reason for defense counsel's failure to object to the dismissal was "because of the precipitous course of events, there was no opportunity for such objection". *Gori* v. *United States,* 367 U.S. 364, 365 n.6 (1961). Failure to object under those circumstances cannot be held a waiver of defendant's Fifth Amendment right against Double Jeopardy.

The doctrine of "manifest necessity" arose in the case of *United States* v. *Perez,* 22 U.S. (9 Wheat.) 579, 580 (1824) where this Court stated:

> We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.

The "manifest necessity" causing the mistrial in the *Perez* case was the fact that the jury was unable to agree on a verdict. Certainly, the "ends of public justice" would be defeated if retrial was not allowed under those circum-

stances. However, the Court, in *Perez,* stated that the power to discharge the jury "ought to be used with the greatest caution, under urgent circumstances and for very plain and obvious causes . . ." Thus, the trial court is not unlimited in its discretion to discharge the jury. Abuse of that discretion will bar retrial. *Downum* v. *United States,* 372 U.S. 734 (1963); *Cornero* v. *United States,* 48 F.2d 69 (9th Cir. 1931).

In *Wade* v. *Hunter,* 336 U.S. 684 (1949), this Court allowed retrial by court-martial after the commanding general of the 76th Division withdrew the charges from the original court-martial and directed it to take no further proceedings. The reason for withdrawing the charges from the original court-martial was that due to the tactical situation of the division involved, certain witnesses could not be called. Since the division in which the court-martial was convened had advanced significantly from the scene of the alleged crime, this Court found that there was a "manifest necessity" for discontinuing the trial and rescheduling it before a court-martial convened near the scene. Thus, the tactical situation presented by a rapidly-advancing army was held to justify retrial. It appears that the only other alternative would have been to have held the defendant in custody pending stabilization of the war to such a point that the officers of his division could return to the scene of the alleged crime to reconvene the court. This certainly would not have been in defendant's interest.

In both *Gori* v. *United States,* 367 U.S. 364 (1961) and *United States* v. *Tateo,* 377 U.S. 463 (1964), retrial was allowed in the interest of protecting the defendant. In *Tateo,* the defendant's original conviction was set aside on his motion after it was determined that his guilty plea

entered during trial had been coerced. In *Gori*, the mistrial was declared in order to protect the defendant from supposedly prejudicial evidence.

Since the defendant in *Tateo* obtained reversal of his initial conviction through a collateral attack, it was not unreasonable to hold that he should stand trial before another jury. As the Court in *Tateo* stated:

> Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. *United States* v. *Tateo*, 377 U.S. 463, 466 (1964).

The attempted retrial of defendant in the instant case did not result from a reversal on appeal obtained by defendant, but was granted after the court refused to allow the prosecution witnesses to testify, in order to prevent a verdict of acquittal in favor of defendant. In this regard, this court in *Tateo* stated:

> If there were any intimation in a case that prosecutorial or judicial impropriety justifying a mistrial resulted from a fear that the jury was likely to acquit the accused, different considerations would, of course, obtain. *United States* v. *Tateo*, 377 U.S. 463, 468 n.3 (1964).

In *Gori*, the court of appeals concluded that the trial judge, in granting the mistrial, "vas acting according to his convictions in protecting the rights of the accused."

Based upon the findings of the court of appeals and upon the "skimpy record" before it, this Court held that the judge did not abuse his discretion in granting the mistrial. This Court upheld retrial in *Gori* because:

> [T]he mistrial order upon which his claim of jeopardy is based was found neither apparently justified nor clearly erroneous by the Court of Appeals in its review of a cold record. What that court did find and what is unquestionable is that the order was the product of the trial judge's extreme solicitude—an overeager solicitude, it may be—*in favor of the accused. Gori* v. *United States,* 367 U.S. 364, 367 (1961). (Emphasis added.)

Gori is clearly distinguishable from the facts of the instant case. In the instant case the trial court found that the witnesses were not prepared to testify and refused to allow them to do so (A 41, 45). The jury was discharged because these were all of the Government's witnesses (A 34) and without them the Government could not go on with its case. Since the Government could not have put on its case without these witnesses, any "extreme solicitude" on the part of the judge in the instant case was in favor of the Government rather than the accused. Retrial after dismissal on this basis is clearly "harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict . . ." *Downum* v. *United States,* 372 U.S. 734, 736 (1963).

II.

There Were No "Extraordinary Circumstances" Indicating a "Manifest Necessity" for Dismissing the Jury in the Instant Case and Such Dismissal Constitutes Harassment of the Defendant and an Aid to the Prosecutor.

For proper analysis the action of the trial court must be divided into two distinct steps: First, the court found that the witnesses were not prepared to testify and refused to allow them to testify (A 41, 45); next, the court summarily dismissed the jury. After having taken the first step, whether rightly or wrongly, the next step did not necessarily follow. The available alternatives indicate absolutely that there was no "manifest necessity" for dismissal of the jury. If the court felt that these witnesses needed legal counsel before testifying, it could have accomplished this end by a short recess without dismissing the jury.

The trial judge abused his discretion in discharging the jury prior to a verdict. That abuse was prejudicial to defendant's right to be tried by the jury empaneled to hear his case. There were no "extraordinary or striking circumstances", *Downum* v. *United States, supra,* at 736, nor was there a "manifest necessity" for discharging the jury, *United States* v. *Perez,* 22 U.S. (9 Wheat.) 579, 580 (1824).

This Court, in *Downum* v. *United States, supra,* made it clear that retrial would not be allowed under the Fifth Amendment Double Jeopardy clause where dismissal of the jury was occasioned by a lack of preparation on the part of the prosecution or was to aid the prosecutor. In that case, the prosecutor had not checked to see if his wit-

nesses were present before he announced he was ready to empanel a jury. When it was found that one critical witness was missing, the judge discharged the jury over defendant's objection.

Under the trial court's interpretation of the law and the facts, the jury in the instant case was also dismissed because the prosecutor was not prepared to go forward with his case. If the trial court is correct in its interpretation of the requirements of the Fifth Amendment right against self-incrimination, the prosecutor should have been aware of the law and should have so prepared his witnesses. In that regard, the instant case is indistinguishable from *Downum*. If, on the other hand, the law is not as the trial court thought it was, his dismissal of the jury was nevertheless solely for the protection of the prosecutor's case and still within the *Downum* rule since there was no way the prosecutor could have obtained a conviction without the witnesses.

The facts here are distinguishable from those in *Gori* and *Tateo,* since in both of those cases mistrial was granted in order to protect the defendant. The reason stated by the trial court for dismissal of the jurors in the instant case was to allow for preparation of the prosecution witnesses. This was a finding made by the trial court after observation of the witnesses and should not be overturned unless clearly erroneous. Even assuming that finding to be erroneous in law, it nonetheless caused the dismissal of the jury after jeopardy had attached. It gave no benefit whatsoever to the defendant since he was prepared to go forward to a verdict with the jury empaneled to hear his case. As this Court stated in *Downum,* 372 U.S. at 738, any doubt should be resolved "in favor of the liberty of the

citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion."

Conclusion

Defendant had been put in jeopardy within the meaning of the Fifth Amendment prohibition against Double Jeopardy, and a direct appeal does not lie under 18 U.S.C. 3731. Defendant respectfully requests that this appeal be summarily dismissed. In the alternative, since retrial under the facts of the instant case would clearly contravene the Double Jeopardy clause of the Fifth Amendment, defendant respectfully submits that the order below dismissing the information should be affirmed.

Respectfully submitted,

DENIS R. MORRILL
Attorney for Appellee

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 19

UNITED STATES OF AMERICA, APPELLANT

v.

MILTON C. JORN, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES ON REARGUMENT

This case was argued and submitted to this Court during the 1969 Term, and was restored to the Calendar for reargument this Term. As to the issues on the merits, raised in our Jurisdictional Statement and argued to the Court last Term, we continue to rely upon our submission of last Term. Although the Court has noted probable jurisdiction in this case, we submit this supplemental brief, in light of *United States* v. *Sisson*, No. 305, O.T. 1969, decided June 29, 1970.

The facts in the present case which are relevant to this Court's jurisdiction may be briefly recounted.

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After a jury had been impaneled and sworn, the district court, either in response to a defense request or on its own motion, discharged the jury before the trial was complete. The government then sought to reprosecute, and, in advance of the second trial, the defendant moved for dismissal of the prosecution on the ground of double jeopardy. The district court granted that motion, and the government noted this appeal, under the Criminal Appeals Act, 18 U.S.C. 3731—particularly the provision which entitles the government to a direct appeal to this Court "From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy."

Under this provision (and its predecessor), this Court has entertained government appeals from the dismissal of prosecutions on double jeopardy grounds as a matter of course, *United States* v. *Tateo*, 377 U.S. 463, 465, and despite jurisdictional challenge, *United States* v. *Oppenheimer*, 242 U.S. 85, 86.[1] Indeed, while there has been dispute among the members of the Court regarding the precise scope of the concept of "motion in bar," *e.g.*, *United States* v. *Mersky*, 361 U.S. 431, 441, 453; *United States* v. *Blue*, 384 U.S. 251, 254, there appears to be general agreement that a motion to dismiss on double jeopardy grounds is archetypal. Section 3731's predecessor referred to a

[1] Oppenheimer's unsuccessful challenge to this Court's jurisdiction was based principally on the ground that the government's right to appeal under the statute was limited to cases questioning the validity or construction of statutes. See Motion to Dismiss and Brief for Appellee, No. 412, O.T. 1916. See, also, *Sisson*, slip op., p. 38, n. 63.

"special plea in bar," and among the most prominent forms of such a plea were the pleas of *autrefois convict* and *autrefois acquit—i.e.*, the plea of double jeopardy. See *Mersky, supra,* 361 U.S. at 457 (Mr. Justice Stewart, dissenting); *Sisson, supra,* at n. 53.

Nothing in *Sisson* is inconsistent with the settled interpretation of Section 3731's applicability to double jeopardy pleas reflected in the *Oppenheimer* and *Tateo* decisions. In *Sisson* the government acknowledged, and this Court held, that the statutory language "when the defendant has not been put in jeopardy" limits the government's right to appeal under the motion-in-bar provision "to situations in which a jury has not been empaneled * * *" (slip op., pp. 34, 35). Obviously, however, neither the Court nor the government was there addressing the situation where one jury had been sworn, then discharged (or its verdict vacated) under circumstances arguably permitting a second trial, and the government then sought to appeal from a pre-trial ruling of the second court.[2]

The government's position is that in such a case, in which the second jury has not yet been empaneled, the government has the same right to appeal under Section 3731 as it would have in identical circum-

[2] Indeed, with *Tateo* and *Oppenheimer* on the books and the present case pending at the time the argument in *Sisson* was heard, there would have been no other reasonable explanation for the government's submission in *Sisson* (quoted at slip op. 37) that it had *always* adhered to the position "that the statute barred appeals from the granting of motions in bar after jeopardy had attached" and "has never sought to appeal in these circumstances."

stances in a case in which there had been no prior proceedings involving another jury—since the appeal from the pre-trial ruling of the second court would not interrupt the prior proceedings and would not be an attempt to review any determinations made in those proceedings.[3] It could conceivably be argued that the Court's discussion in *Sisson* of the motion in bar provision raises some doubt about the correctness of that interpretation of Section 3731 in cases in which the government seeks to appeal from a pre-trial ruling of the second court which is made in response to the renewal of a motion which had also been presented to the first court or which otherwise is based on considerations that were equally relevant to the prior proceedings. We do not believe, however, that any such doubt extends to cases like the present one, in which the plea of double jeopardy was a motion in bar of the trial before the second jury only and presented no question relevant to the validity of the prior proceedings. We perceive nothing in the reasoning of *Sisson* which calls for reconsideration

[3] In terms of the statutory language, our position is that the proviso "when the defendant has not been put in jeopardy" refers to "jeopardy" in the second trial whenever the pre-trial ruling from which the government seeks to appeal was made in the second trial.

of the rule established in *Tateo* and *Oppenheimer* for this narrow category of cases.

Respectfully submitted.

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AUGUST 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 19

UNITED STATES OF AMERICA,

Appellant

v.

MILTON C. JORN

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

SUPPLEMENTAL MEMORANDUM FOR MILTON C. JORN ON REARGUMENT

This case was argued and submitted to this court during the 1969 term. On April 27, 1970, this Court restored the case to the calendar for reargument. On the merits of the issues raised in the motion to dismiss or affirm, and the brief

filed and argued to the Court last term, defendant continues to rely upon his submission of last term. This supplemental memorandum is submitted on the jurisdictional question in the light of *United States v. Sisson*, ___ U.S. ___, 26 L, Ed. 2d 608 (1970) and in response to the supplemental memorandum filed by the Solicitor General.

Defendant agrees with the statement of facts set forth in the supplemental brief of the government with the exception that it is the position of defendant that the record clearly shows that the dismissal of the jury was by the court on its own motion and not in response to any request of the defense (A. 40-42).

Under the cases as they stand, *Sisson* included, it is clear that defendant's motion in the lower court was a motion in bar. In the light of *Sisson*, the jurisdictional issue presented by this appeal is whether defendant has been "put in jeopardy" within the meaning of the Criminal Appeals Act, 18 U.S.C. 3731. It is defendant's position that this case is controlled by *Sisson* and that no appeal lies because defendant had been placed in jeopardy.

Research reveals no case decided by this Court under the Criminal Appeals Act in which the question of jurisdiction based upon the meaning of "jeopardy" has been raised prior to *Sisson*. The government states that this Court has "entertained government appeals from the dismissal of prosecutions on double jeopardy grounds as a matter of course, *United States v. Tateo*, 377 U.S. 463, 465, and despite jurisdictional challenge, *United States v. Openheimer*, 242 U.S. 85, 86." (Supp. Memo at 2). A reading of these cases shows that the question of jurisdiction is not discussed by this Court in *Tateo*. Apparently this question was not raised. It is true that the question of jurisdiction was discussed in *Openheimer*, but the plea in bar relied upon in that case was a plea of the statute of limitations, made before trial was had. There was no discussion in the case of the question of "jeopardy" within the meaning of the Criminal Appeals Act, 18 U.S.C. 3731.

The Second Circuit, in *United States v. Zisblatt*, 172 F. 2d 743 (2d Cir. 1949) recognized the question now before this Court, but did not decide it. That court had before it a case in which the defendant had been tried to a jury, after the court reserved judgment on motions to dismiss the indictment. After a verdict of conviction by the jury, the court granted the motion to dismiss the indictment.

Judge Hand was faced with the question of whether he should certify the case to the Supreme Court under the Criminal Appeals Act. He pointed out the two possible interpretations of "jeopardy" as used in the Criminal Appeals Act and opined that if the Supreme Court read the term in the Constitutional sense it would have jurisdiction. On that basis the case was certified by Judge Hand, but on motion of the government, the appeal was dismissed, 336 U.S. 934 (1949). The Solicitor General, in his brief in *Sisson*, stated the reason for this dismissal to be that the government was barred by statute from appealing, jeopardy having attached. See *United States v. Sisson, supra*, at 633.

The government attempts to distinguish the instant case from the law set forth in *Sisson*. The Solicitor General, in his Supplemental Memorandum, argues that his admission in *Sisson* is not dispositive of this case.[1] The government contends that this case is distinguishable in that the court and the government in *Sisson* were not addressing themselves to "the situation where one jury had been sworn, then discharged (or its verdict vacated) under circumstances arguably permitting a second trial". (Supp. Memo. at 3). The government's position as set forth in its Suppelemental Memorandum is that:

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[1] In *Sisson* the government admitted that the statutory language "when a defendant has not been put in jeopardy" in the Criminal Appeals Act limits the government's right to appeal under the motion in bar provisions to situations in which the jury has not been sworn. *United States v. Sisson, supra*, at 633.

> In terms of the statutory language . . . the proviso "when the defendant has not been put in jeopardy" refers to "jeopardy" in the second trial whenever the pretrial ruling from which the government seeks to appeal was made in the second trial.

There is certainly nothing in the cases or the legislative history surrounding the Criminal Appeals Act to support such a distinction. In fact, the majority of this Court in *Sisson* held that "jeopardy" within the meaning of 3731 attaches with the empaneling of a jury. The government's argument that "arguably retriable" cases should be distinguished goes against the holding of this Court in that case. In order to determine whether a defendant is "arguably retriable", under that theory, the Court would have to make a Constitutional determination under the Double Jeopardy Clause. The majority of this Court in *Sisson* held that such a determination is not contemplated by the Criminal Appeals Act. *United States v. Sisson, supra*, at 632-33.

The shallow nature of the government's attempt to distinguish is easily manifest. The government argues that an appeal lies in the instant case because defendant's motion was made prior to the empaneling of a second jury. It follows, then, that if defendant had waited to make his motion until after a second jury had been empaneled,[2] there could have been no appeal on the part of the government. The result of the government's argument is that the defendant, in an attempt to promote efficient judicial administration and obviate the necessity of calling a new jury, by the timing of his motion, granted the government a right of appeal it otherwise would not have had. Certainly this was not the intent of Congress in the passage of the Criminal Appeals Act.

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[2] Rule 12(b) of the Federal Rules of Criminal Procedure gives a defendant the option of raising the defense of once in jeopardy either prior to trial or at a later date. *Rollerson v. United States*, 394 U.S. 575 (1969), *reversing*, 405 F.2d 1078 (C.A.D.C. 1968). 18 U.S.C. Rule 12(b)(1) and (2). Notes of Advisory Committee on Rules, See 8 Moores Federal Practice ¶ 12.01[2].

The government's position here is inconsistent with its position in *Zisblatt*. The procedural situation of *Zisblatt* was very similar to the instant case since the motion there was granted after the first jury had been empaneled and before a second jury had been called. The dismissal of that appeal by the government, on grounds that it was barred by statute from appealing, was an admission that "jeopardy" within the meaning of the Criminal Appeals Act attached prior to the swearing of a second jury. Such an interpretation of the "jeopardy" provision of the Criminal Appeals Act is the only logical interpretation.

There was no rule established in *Tateo* and *Openheimer* with respect to the jurisdiction question posed by the "jeopardy" provision of the Criminal Appeals Act. The issue was not raised or met in either of those cases. Therefore, *Sisson* is the first consideration given to that question and the instant case is controlled by the holding of *Sisson* that no appeal will lie by the government after the jury has been empaneled. This court has no jurisdiction to hear the instant appeal and defendant's motion to dismiss the appeal should be granted.

Respectfully submitted,

DENIS R. MORRILL
Attorney for Appellee

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* JORN

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

No. 19. Argued January 12, 1970—Reargued October 22, 1970—Decided January 25, 1971

Appellee was tried in Federal District Court on an information charging him with willfully assisting in the preparation of fraudulent income tax returns. Following the impanelling of the jury, the prosecutor called to the stand a taxpayer whom appellee allegedly had aided in preparing his return. At defense counsel's suggestion, the judge warned the witness of his constitutional rights. The witness expressed his willingness to testify, stating that he had been warned of his rights when first contacted by the Internal Revenue Service (IRS). The judge refused to permit him to testify until he had consulted an attorney, indicating that he did not believe the witness had been warned by the IRS. Although the prosecutor advised the judge that the remaining witnesses had been warned of their rights by the IRS upon initial contact, the judge stated that the warnings were probably inadequate. Thereupon he discharged the jury and aborted the trial so that the witnesses could consult with attorneys. The case was set for retrial before another jury, but on appellee's pretrial motion the judge dismissed the information on the ground of former jeopardy. The Government filed a direct appeal to this Court. *Held:* The judgment is affirmed. Pp. 2–16.

Affirmed.

MR. JUSTICE HARLAN, joined by THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, and MR. JUSTICE MARSHALL, concluded that:

1. The sustaining of a motion in bar based on a plea of former jeopardy is appealable by the Government, as long as the motion was sustained, as here, prior to the impanelling of the jury in the subsequent proceeding at which the motion was made. Cf. *United States* v. *Sisson*, 397 U. S. 267. Pp. 2–7.

Syllabus

2. The Fifth Amendment's Double Jeopardy Clause represents a constitutional policy of finality for the defendant's benefit in federal criminal proceedings. Pp. 8–15.

(a) Although it is recognized that a defendant can be reprosecuted after a successful appeal, double jeopardy policies are not confined to the prevention of prosecutorial or judicial overreaching. Pp. 12–13.

(b) The defendant has the option to have his case considered by the first jury, and where the judge, acting without defendant's consent, aborts the trial, the defendant has been deprived of his "valued right to have his trial completed by a particular tribunal." P. 13.

(c) In the absence of defendant's motion for a mistrial, the doctrine of "manifest necessity," *United States* v. *Perez*, 9 Wheat. 579, 580, commands trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion warrants the conclusion that justice would not be served by a continuation of the trial. Pp. 14–15.

(d) A judge must temper the decision whether or not to abort the trial by considering the importance to the defendant of being able finally to conclude his confrontation with society through the verdict of a tribunal that he might believe is favorable to him. P. 15.

3. The trial judge here abused his discretion, and accordingly appellee's reprosecution would violate the Double Jeopardy Clause. Pp. 15–16.

MR. JUSTICE BLACK and MR. JUSTICE BRENNAN concluded that the Court lacks jurisdiction of the appeal under 18 U. S. C. § 3731 because the trial judge's action amounted to an acquittal, but they join the Court's judgment in view of the decision of a majority of the Court to reach the merits. P. 16.

HARLAN, J., announced the judgment of the Court in an opinion in which BURGER, C. J., and DOUGLAS and MARSHALL, JJ., joined. BURGER, C. J., filed a concurring opinion. BLACK and BRENNAN, JJ., filed a statement concurring in the judgment. STEWART, J., filed a dissenting opinion in which WHITE and BLACKMUN, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 19.—October Term, 1970

United States, Appellant, v. Milton C. Jorn. | On Appeal From the United States District Court for the District of Utah.

[January 25, 1971]

Mr. Justice Harlan delivered the judgment of the Court in an opinion joined by The Chief Justice, Mr. Justice Douglas, and Mr. Justice Marshall.

The Government directly appeals the order of the United States District Court for the District of Utah dismissing, on the ground of former jeopardy, an information charging the defendant-appellee with willfully assisting in the preparation of fraudulent income tax returns, in violation of 26 U. S. C. § 7206 (2).

Appellee was originally charged in February 1968 with 25 counts of violating § 7206 (2). He was brought to trial before Chief Judge Ritter on August 27, 1968. After the jury was chosen and sworn, 14 of the counts were dismissed on the Government's motion. The trial then commenced, the Government calling as its first witness an Internal Revenue Service agent in order to put in evidence the remaining 11 allegedly fraudulent income tax returns the defendant was charged with helping to prepare. At the trial judge's suggestion, these exhibits were stipulated to and introduced in evidence without objection. The Government's five remaining witnesses were taxpayers whom the defendant allegedly had aided in preparation of these returns.

After the first of these witnesses was called, but prior to the commencement of direct examination, defense

counsel suggested that these witnesses be warned of their constitutional rights. The trial court agreed, and proceeded, in careful detail, to spell out the witness' right not to say anything that might be used in a subsequent criminal prosecution against him and his right, in the event of such a prosecution, to be represented by an attorney. The first witness expressed a willingness to testify and stated that he had been warned of his constitutional rights when the Internal Revenue Service first contacted him. The trial judge indicated, however, that he did not believe the witness had been given any warning at the time he was first contacted by the IRS, and refused to permit him to testify until he had consulted an attorney.

The trial judge then asked the prosecuting attorney if his remaining four witnesses were similarly situated. The prosecutor responded that they had been warned of their rights by the IRS upon initial contact. The judge, expressing the view that any warnings that might have been given were probably inadequate, proceeded to discharge the jury; he then called all the taxpayers into court, and informed them of their constitutional rights and of the considerable dangers of unwittingly making damaging admissions in these factual circumstances. Finally, he aborted the trial so the witnesses could consult with attorneys.

The case was set for retrial before another jury, but on pretrial motion by the defendant, Judge Ritter dismissed the information on the ground of former jeopardy. The Government filed a direct appeal to this Court, and we noted probable jurisdiction. 396 U. S. 810 (1969). The case was argued at the 1969 Term and thereafter set for reargument at the present Term. 397 U. S. 1060 (1970).

I

Appellee contends, at the threshold, that our decision in *United States* v. *Sisson*, 399 U. S. 267, 302–307 (1970),

which followed our noting of probable jurisdiction in this case, forecloses appeal by the Government under the motion-in-bar provisions of 18 U. S. C. § 3731 prior to its recent amendment.[1] The question was fully briefed and argued on reargument.

The statute provided in relevant part, for an appeal by the Government direct to the Supreme Court "[f]rom the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy." Appellee concedes, as indeed he must under the prior rulings of this Court, that his plea of former jeopardy constituted a "motion in bar" within the meaning of the statute.[2] The issue is whether appellee had been "put in jeopardy" by virtue of the impanelling of the jury in the first proceeding before the declaration of mistrial. In *Sisson, supra,* the opinion of the Court [3]—in discussing the applicability of the motion-in-bar provision to the Government's direct appeal of the trial judge's actions there—concluded, *inter alia,* that the "put

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[1] These provisions of the Criminal Appeals Act have recently been amended. See n. 6, *infra.* However, the new amendment does not apply to cases begun in the District Court before the effective date of enactment. *Ibid.* Our jurisdiction over the present appeal is therefore controlled by the terms of the Criminal Appeals Act as codified at 18 U. S. C. § 3731 (1964).

[2] The common law equivalent of the motion in bar was used to raise the defenses of prior acquittal, prior conviction, and pardon. See *United States* v. *Murdock,* 284 U. S. 141, 151 (1931). Whether the motion-in-bar provision is construed broadly to reach any plea having the effect of preventing further prosecutions, see *United States* v. *Mersky,* 361 U. S. 431, 441–443 (1960) (BRENNAN, J., concurring), or narrowly to reach only pleas in the nature of confession and avoidance, see *United States* v. *Mersky, supra,* at 455–458 (STEWART, J., dissenting), appellee's plea of former jeopardy based on the prior declaration of mistrial would be included. Cf. *United States* v. *Blue,* 384 U. S. 251, 254 (1966). See generally *United States* v. *Sisson,* 399 U. S. 267, 300 n. 53 (1970).

[3] The portion of the Court's opinion in *Sisson* under discussion here was joined in by only four members of the Court.

in jeopardy" language applied whenever the jury had been impanelled, even if the defendant might constitutionally have been retried under the double jeopardy provisions of the Fifth Amendment. 395 U. S. 302–307.[4]

Here the jury in the first proceeding had been impanelled before the mistrial ruling, but appellee's motion to dismiss on grounds of former jeopardy was made prior to the impanelling of the second jury. The Government contends that the impanelling of the jury must be understood to apply to the jury in the proceeding to which the plea of former jeopardy is offered as a bar, rather than the jury whose impanelling was, in the first instance, essential to sustain the plea on the merits. Appellee contends that the construction put on the statute in the *Sisson* opinion requires the conclusion that the Government may not appeal when a jury in the prior proceeding for the offense in question has been impanelled.

We think the Government has the better of the argument.[5] The Court's opinion in *Sisson* dealt with the problem presented by the trial judge's order purporting to arrest the entry of judgment on the guilty verdict

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[4] MR. JUSTICE WHITE's dissenting opinion contended that the jeopardy language applies to preclude governmental appeal only where the defendant's reprosecution would be barred by the Constitution.

[5] The Government relies in part on *United States* v. *Tateo*, 377 U. S. 463 (1964), and *United States* v. *Oppenheimer*, 242 U. S. 85 (1916), as sustaining jurisdiction under 18 U. S. C. § 3731 to review the trial court's action in granting a pretrial motion to dismiss on double jeopardy grounds after the prior proceeding ended in a mistrial. In *Tateo*, however, jurisdiction was neither raised by the parties nor considered by the Court; therefore, it is of little significance on the jurisdiction point. In *Oppenheimer*, the motion in bar in the second proceeding rested on an earlier pretrial motion based on the statute of limitations; the theory of the second plea was *res judicata*.

returned by the very jury whose impanelling was claimed to constitute "jeopardy" within the meaning of the motion-in-bar provision. The conclusion that jeopardy had attached by the impanelling of the jury in that proceeding rested on the view that the Congress was concerned, in granting the Government appeal rights in certain classes of cases, to avoid subjecting the defendant to a second trial where the first trial had terminated in a manner favorable to the defendant either because of a jury verdict or because of judicial action. See *Sisson, supra,* 293–300. The "compromise origins" of the Criminal Appeals Act, see *id.,* 307, reflected this concern, and that concern is an important consideration supporting the canon of strict construction traditionally applied to this statute. See *id.,* 296–300; *Will* v. *United States,* 389 U. S. 90, 96–98 (1967).

In the mistrial situation, the judicial ruling that is chronologically analogous to the *Sisson* facts would be the declaration of a mistrial after the first jury has been impanelled. Obviously, the Government could not have appealed Judge Ritter's original declaration of mistrial. Since a mistrial ruling explicitly contemplates reprosecution of the defendant, the nonappealability of this judicial action fits with congressional action in excluding pleas in abatement from the class of cases warranting appellate review. The nonappealable status of rulings of this sort is fully explainable in terms of a policy disfavoring appeals from interlocutory rulings. See the discussion in *Will* v. *United States,* 389 U. S. 90, 96–98 (1967).

But it does not follow from the nonappealability of rulings which are essentially interloctutory insofar as they expressly contemplate resumption of the prosecution, that Congress intended to foreclose governmental appeal from the sustaining of a later motion in bar on the trial judge's conclusion that constitutional double

jeopardy policies require that the earlier mistrial ruling now be accorded the effect of barring reprosecution. Indeed, when we recall that pleas of former jeopardy were the paradigm illustrations of motions in bar at common law, see n. 2 *supra*, it seems much more likely that the congressional decision to allow governmental appeals from the judge's decision sustaining a motion in bar was intended to permit review of later judicial action possibly premised on erroneous theories concerning constitutional effects attaching to the earlier interlocutory ruling.

Consistently with the Court's opinion in *Sisson*, the sustaining of a motion in bar based on a plea of former jeopardy would be appealable as long as the motion in bar was sustained prior to the impanelling of the jury in the subsequent proceeding.[6] Since Judge Ritter in

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[6] Appellee points out that Rule 12 (b)(1) of the Federal Rules of Criminal Procedure permits the defendant to raise the defense of former jeopardy on motion before or after the impanelling of the jury. See Notes of the Advisory Committee, 8 Moore's Federal Practice ¶ 12.01 (2). Thus, it is suggested that the defendant may deprive the Government of its appeal simply by delaying his motion to dismiss until the jury has been impanelled. This problem, of course, is inherent in the structure of the Criminal Appeals Act prior to amendment; for example, the defendant under Rule 12 (b)(1) may also delay his statute of limitations plea until after the impanelling of the jury, see *ibid.*, thereby depriving the Government of its § 3731 appeal to this Court. Soon after the passage of the original Act, the Attorney General recognized the problem and proposed that the Act be amended to require counsel for the defendant to raise and argue such questions before jeopardy attaches. See *Sisson*, *supra*, 305–306. A recently enacted amendment to the Criminal Appeals Act undertakes to deal with the problem by allowing the Government to appeal "to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution." Omnibus Crime Control Act of 1970, § 14 (a)(1), 84 Stat. 1890 (January 2, 1971). However, the amendment is

this case dismissed the indictment on appellee's plea of former jeopardy prior to the impanelling of the second jury, we conclude that the decision is directly appealable by the Government as a motion in bar before the defendant was "put in jeopardy" within the meaning of the applicable statute. Hence we proceed to the merits of appellee's claim that reprosecution after the declaration of mistrial in the earlier proceeding would violate his Fifth Amendment rights.[7]

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not applicable to any criminal case begun in any district court before the effective date of the amendment. *Ibid.*, § 14 (b). See also S. Rep. No. 91–1296, 91st Cong., 2d Sess., 6–7.

[7] It is clear from the record in this case that Judge Ritter's action cannot, as two members of the Court suggest, be classified as an "acquittal" for purposes of this Court's jurisdiction over the appeal under 18 U. S. C. § 3731. First, Judge Ritter's action at the original trial clearly contemplated reprosecution of the defendant after the witnesses had consulted with attorneys. See Appendix, 46 and MR. JUSTICE STEWART's dissent at n. 1 *infra*. Judge Ritter's subsequent action dismissing the information was simply put on the ground of defendant's plea of former jeopardy, without further explanation. Appendix, 60. But the parties below put the question of former jeopardy to Judge Ritter exclusively in terms of the Court's line of cases concerning reprosecutability after mistrial declarations without the defendant's consent. See Appendix, 55–59, which contain the entire post-mistrial proceedings before Judge Ritter.

Of course, as we noted in *Sisson*, *supra*, 290, the trial judge's characterization of his own action cannot control the classification of the action for purposes of our appellate jurisdiction. But *Sisson* goes on to articulate the criterion of an "acquittal" for purposes of assessing our jurisdiction to review; *i. e.*, the trial judge's disposition is an "acquittal" if it is "a legal determination on the basis of facts adduced at the trial relating to the general issue of the case. . . ." *Sisson*, *supra*, 290 n. 19. The record in this case is utterly devoid of any indication of reliance by Judge Ritter on facts relating to the general issue of the case, thereby surely distinguishing this case from *Sisson*, and, one would think, under the very reasoning of *Sisson*, compelling the conclusion that whatever else Judge Ritter may have done, he did not "acquit" the defendant in the relevant sense.

II

The Fifth Amendment's prohibition against placing a defendant "twice in jeopardy" represents a constitutional policy of finality for the defendant's benefit in federal criminal proceedings.[8] A power in government to subject the individual to repeated prosecutions for the same offense would cut deeply into the framework of procedural protections which the Constitution establishes for the conduct of a criminal trial. And society's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws. Both of these considerations are expressed in *Green* v. *United States*, 355 U. S. 184, 187–188 (1957), where the Court noted that the policy underlying this provision "is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." These considerations have led this Court to conclude that a defendant is placed in jeopardy in a criminal proceeding once the defendant is put to trial before the trier of the facts, whether the trier be a jury or a judge. See *Green* v. *United States*, *supra*, 188; *Wade* v. *Hunter*, 336 U. S. 684, 688 (1949).

But it is also true that a criminal trial is, even in the best of circumstances, a complicated affair to manage. The proceedings are dependent in the first instance on

[8] Two terms ago the double jeopardy provision of the Fifth Amendment was made directly applicable to the States. See *Benton* v. *Maryland*, 395 U. S. 784 (1969).

the most elementary sort of considerations, *e. g.*, the health of the various witnesses, parties, attorneys, jurors, etc., all of whom must be prepared to arrive at the courthouse at set times. And when one adds the scheduling problems arising from case overloads, and the Sixth Amendment's requirement that the single trial to which the double jeopardy provision restricts the Government be conducted speedily, it becomes readily apparent that a mechanical rule prohibiting retrial whenever circumstances compel the discharge of a jury without the defendant's consent would be too high a price to pay for the added assurance of personal security and freedom from governmental harrassment which such a mechanical rule would provide. As the Court noted in *Wade* v. *Hunter*, 336 U. S. 684, 689 (1949), "a defendant's valued right to have his trial completed by a particular tribunal must in some circumstances be subordinated to the public's interest in fair trials designed to end in just judgments."

Thus the conclusion that "jeopardy attaches" when the trial commences expresses a judgment that the constitutional policies underpinning the Fifth Amendment's guarantee are implicated at that point in the proceedings. The question remains, however, in what circumstances retrial is to be precluded when the initial proceedings are aborted prior to verdict without the defendant's consent.

In dealing with that question, this Court has, for the most part, explicitly declined the invitation of litigants to formulate rules based on categories of circumstances which will permit or preclude retrial. Thus, in *United States* v. *Perez*, 22 U. S. (9 Wheat.) 579 (1824), this Court held that a defendant in a capital case might be retried after the trial judge had, without the defendant's consent, discharged a jury that reported itself unable to agree. Mr. Justice Story's opinion for the Court in

Perez expressed the following thoughts on the problem of reprosecution after a mistrial had been declared without the consent of the defendant:

> "We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office." 22 U. S. (9 Wheat.) 580.

The *Perez* case has since been applied by this Court as a standard of appellate review for testing the trial judge's exercise of his discretion in declaring a mistrial without the defendant's consent. *E. g., Simmons* v. *United States,* 142 U. S. 148 (1891) (reprosecution not barred where mistrial declared because letter published in newspaper renders juror's impartiality doubtful); *Logan* v. *United States,* 144 U. S. 263 (1892) (reprosecution not barred where jury discharged after 40 hours of deliberation for inability to reach a verdict); *Thompson* v. *United States,* 155 U. S. 271 (1894) (reprosecution

not barred where jury discharged because one juror had served on grand jury indicting defendant); *Wade* v. *Hunter*, 336 U. S. 684 (1949) (retrial not barred where military court martial discharged due to tactical necessity in the field).[9]

But a more recent case—*Gori* v. *United States*, 367 U. S. 364 (1961)—while adhering in the main to the *Perez* theme of a "manifest necessity" standard of appellate review—does suggest the possibility of a variation on that theme according to a determination by the appellate court as to which party to the case was the beneficiary of the mistrial ruling. In *Gori*, the Court was called upon to review the action of a trial judge in discharging the jury when it appeared to the judge that the prosecution's questioning of a witness might lead to the introduction of evidence of prior crimes. We upheld reprosecution after the mistrial in an opinion which, while applying the principle of *Perez*, appears to tie the judgment that there was no abuse of discretion in these circumstances to the fact that the judge was acting "in the sole interest of the defendant." 367 U. S. 369; see also the dissenting opinion of MR. JUSTICE DOUGLAS, at 367 U. S. 370.[10]

In the instant case, the Government, relying principally on *Gori*, contends that even if we conclude the trial judge here abused his discretion, reprosecution should be permitted because the judge's ruling "benefited" the defendant and also clearly was not compelled by bad-faith prosecutorial conduct aimed at triggering a mistrial in order to get another day in court. If the judgment as to who was "benefited" by the mistrial ruling turns on the appellate court's conclusion concern-

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[9] See also Annotation: Double Jeopardy—Mistrial, 6 L. Ed. 2d 1509; J. Sigler, Double Jeopardy 39–47 (1969).

[10] And see Annotation, *supra* 1511; J. Sigler, 44–45.

ing which party the trial judge was, in point of personal motivation, trying to protect from prejudice, it seems reasonably clear from the trial record here that the judge's insistence on stopping the trial until the witnesses were properly warned was motivated by the desire to protect the witnesses rather than the defendant. But the Government appears to view the question of "benefit" as turning on an appellate court's *post hoc* assessment as to which party would in fact have been aided in the hypothetical event that the witnesses had been called to the stand after consulting with their own attorneys on the course of conduct that would best serve to insulate them personally from criminal and civil liability for the fraudulent tax returns. That conception of benefit, however, involves nothing more than an exercise in pure speculation. In sum, we are unable to conclude on this record that this is a case of a mistrial made "in the sole interest of the defendant." See *Gori* v. *United States, supra.*

Further, we think that a limitation on the abuse of discretion principle based on an appellate court's assessment of which side benefited from the mistrial ruling does not adequately satisfy the policies underpinning the double jeopardy provision. Reprosecution after a mistrial has unnecessarily been declared by the trial court obviously subjects the defendant to the same personal strain and insecurity regardless of the motivation underlying the trial judge's action. The Government contends, however, that the policies evinced by the double jeopardy provision do not reach this sort of injury; rather the unnecessarily inflicted second trial must, in the Government's view, appear to be the result of a mistrial declaration which "unfairly aids the prosecution or harasses the defense." Gov. Brief, 8.

Certainly it is clear beyond question that the Double Jeopardy Clause does not guarantee a defendant that the Government will be prepared, in all circumstances, to

vindicate the social interest in law enforcement through the vehicle of a single proceeding for a given offense. Thus, for example, reprosecution for the same offense is permitted where the defendant wins a reversal on appeal of a conviction. *United States* v. *Ball*, 163 U. S. 662 (1896); see *Green* v. *United States*, 355 U. S. 184, 189 (1957). The determination to allow reprosecution in these circumstances reflects the judgment that the defendant's double jeopardy interests, however defined, do not go so far as to compel society to so mobilize its decision-making resources that it will be prepared to assure the defendant a single proceeding free from harmful governmental or judicial error. But it is also clear that recognition that the defendant can be reprosecuted for the same offense after successful appeal does not compel the conclusion that double jeopardy policies are confined to prevention of prosecutorial or judicial overreaching. For the crucial difference between reprosecution after appeal by the defendant and reprosecution after a *sua sponte* judicial mistrial declaration is that in the first situation the defendant has not been deprived of his option to go to the first jury and, perhaps, end the dispute then and there with an acquittal. On the other hand, where the judge, acting without the defendant's consent, aborts the proceeding, the defendant has been deprived of his "valued right to have his trial completed by a particular tribunal." [11] See *Wade* v. *Hunter*, 336 U. S. 684, 689 (1949).

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[11] We think that nothing said in *United States* v. *Tateo*, 377 U. S. 463, 467 (1964), can properly be taken as indicating a contrary view. For there, even though defendant's guilty plea which aborted the trial was subsequently held to have been coerced by judicial action, the defendant nonetheless was not foreclosed of his option to go to the jury if he chose to do so, and thereafter rely on post-conviction proceedings to redress the wrong done to him by the judge. In other words, the question of "voluntariness" for purposes of assessing

If that right to go to a particular tribunal is valued, it is because, independent of the threat of bad-faith conduct by judge or prosecutor, the defendant has a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial. Thus, where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error.[12] In the absence of such a motion, the *Perez* doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings. See *United States* v. *Perez*, 22 U. S. (9 Wheat.) 579, 580 (1824).

The conscious refusal of this Court to channel the exercise of that discretion according to rules based on categories of circumstances, see *Wade* v. *Hunter*, 336 U. S. 684, 691 (1949), reflects the elusive nature of the problem presented by judicial action foreclosing the defendant from going to his jury. But that discretion must still be exercised; unquestionably an important factor to be considered is the need to hold litigants on both sides to standards of responsible professional conduct in the clash of an adversary criminal process. Yet

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the validity of a plea of guilty—whether offered before or at trial—must be distinguished from the question of "voluntariness" for purposes of assessing reprosecutability under the Double Jeopardy Clause.

[12] Conversely, where a defendant's mistrial motion is necessitated by judicial or prosecutorial impropriety designed to avoid an acquittal, reprosecution might well be barred. Cf. *United States* v. *Tateo*, 377 U. S. 463, 468 n. 3 (1964); n. 11 *supra*.

we cannot evolve rules based on the source of the particular problem giving rise to a question whether a mistrial should or should not be declared, because, even in circumstances where the problem reflects error on the part of one counsel or the other, the trial judge must still take care to assure himself that the situation warrants action on his part foreclosing the defendant from a potentially favorable judgment by the tribunal.

In sum, counsel for both sides perform in an imperfect world; in this area, bright-line rules based on either the source of the problem or the intended beneficiary of the ruling would only disserve the vital competing interests of the Government and the defendant. The trial judge must recognize that lack of preparedness by the Government to continue the trial directly implicates policies underpinning both the double jeopardy provision and the speedy trial guarantee. Cf. *Downum* v. *United States*, 372 U. S. 734 (1963). Alternatively, the judge must bear in mind the potential risks of abuse by the defendant of society's unwillingness to unnecessarily subject him to repeated prosecutions. Yet, in the final analysis, the judge must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate.

III

Applying these considerations to the record in this case, we must conclude that the trial judge here abused his discretion in discharging the jury. Despite assurances by both the first witness and the prosecuting attorney that the five taxpayers involved in the litigation had all been warned of their constitutional rights, the judge refused to permit them to testify, first expressing his disbelief that they were warned at all, and then ex-

pressing his views that any warnings that might have been given would be inadequate. Appendix 41–42. In probing the assumed inadequacy of the warnings that might have been given, the prosecutor was asked if he really intended to try a case for willfully aiding in the preparation of fraudulent returns on a theory that would not incriminate the taxpayers. When the prosecutor started to answer that he intended to do just that, the judge cut him off in midstream and immediately discharged the jury. Appendix 42–43. It is apparent from the record that no consideration was given to the possibility of a trial continuance; indeed, the trial judge acted so abruptly in discharging the jury that, had the prosecutor been disposed to suggest a continuance, or the defendant to object to the discharge of the jury, there would have been no opportunity to do so. When one examines the circumstances surrounding the discharge of this jury, it seems abundantly apparent that the trial judge made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity for the *sua sponte* declaration of this mistrial. *United States* v. *Perez*, 22 U. S. (9 Wheat.) 579, 580 (1824). Therefore, we must conclude that in the circumstances of this case, appellee's reprosecution would violate the double jeopardy provision of the Fifth Amendment.

Affirmed.

MR. JUSTICE BLACK and MR. JUSTICE BRENNAN believe that the Court lacks jurisdiction over this appeal under 18 U. S. C. § 3731 because the action of the trial judge amounted to an acquittal of appellee and therefore there was no discretion left to the trial judge to put appellee again in jeopardy. However, in view of a decision by a majority of the Court to reach the merits, they join the judgment of the Court.

SUPREME COURT OF THE UNITED STATES

No. 19.—October Term, 1970

United States, Appellant, v. Milton C. Jorn.	On Appeal From the United States District Court for the District of Utah.

[January 25, 1971]

Mr. Chief Justice Burger, concurring.

I join in the opinion and judgment of the Court not without some reluctance, however, since the case represents a plain frustration of the right to have this case tried, attributable solely to the conduct of the trial judge. If the accused had brought about the erroneous mistrial ruling we would have a different case, but this record shows nothing to take petitioner's claims outside the classic mold of being twice placed in jeopardy for the same offense.

SUPREME COURT OF THE UNITED STATES

No. 19.—October Term, 1970

United States, Appellant, v. Milton C. Jorn.	On Appeal From the United States District Court for the District of Utah.

[January 25, 1971]

Mr. Justice Stewart with whom Mr. Justice White and Mr. Justice Blackmun join, dissenting.

The plurality opinion today says that whenever a trial judge in a criminal case has "abused his discretion" in declaring a mistrial on his own motion, the constitutional guaranty against double jeopardy categorically operates to forestall a trial of the case on the merits. I cannot agree.

The District Judge's decision to declare a mistrial in this case was based on his belief that the prosecution witnesses, who were to testify that they had submitted false income tax returns prepared by the defendant, had not been adequately warned that they might themselves incur criminal liability by their testimony. The judge apparently intended simply to postpone the case so that the witnesses could be fully apprised of their constitutional rights,[1] and a second trial was scheduled before a new jury. However, before the new trial date defendant filed a motion to dismiss the information on the ground of former jeopardy, and the judge granted the motion. The Government appealed directly to this Court.[2]

[1] The trial judge stated:

"So this case is vacated, setting is vacated this afternoon, and it will be calendared again; and, before it is calendared again, I am going to have these witnesses in and talk to them again before I will permit them to testify."

[2] I agree that the Court has jurisdiction of this appeal, for the reasons set out in Part I of the plurality opinion.

It is, of course, common ground that there are many circumstances under which a trial judge may discharge a jury and order a new trial, without encountering any double jeopardy problems. One example is where the judge acts at the instance of the defendant himself. See *United States* v. *Tateo*, 377 U. S. 463, 467. Another is where the jury cannot reach a verdict, and there the trial judge may proceed on his own initiative, even over the active objection of the defendant, to declare a mistrial. *United States* v. *Perez*, 22 U. S. (9 Wheat.) 579. Cf. *Simmons* v. *United States*, 142 U. S. 148; *Wade* v. *Hunter*, 336 U. S. 684. On the other hand, there are situations where the circumstances under which the mistrial was declared may be such as to bar a future prosecution. One example is where a "judge exercises his authority to help the prosecution, at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict the accused." *Gori* v. *United States*, 367 U. S. 364, 369. I should suppose that whether misconduct of this kind occurs at the instance of the prosecutor or on the trial judge's sole initiative, there is no question but that the guaranty against double jeopardy would make another trial impermissible.

The present case does not fall neatly into any of these conventional categories. There was no request for a mistrial from defense counsel (although his suggestion that the witnesses be warned of their constitutional rights may have triggered the course of events that followed), and the case certainly cannot be analogized to that of a hung jury. Conversely, the mistrial was not requested by the prosecutor, and there is not the slightest indication that he desired it to occur. Nor is there any suggestion that this was a situation involving "harassment," or an attempt by judge or prosecutor to enhance the possibility of conviction in a second trial.

The plurality opinion purports to resolve the matter by adopting a rule of "abuse of discretion" by the trial judge. This standard is said to derive from the statement of the Court in the leading case of *United States* v. *Perez*, 22 U. S. (9 Wheat.) 579, 580:

> "We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes . . . . But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office."

The plurality opinion appears to construe this passage to mean that an appellate court, in determining the applicability of the double jeopardy guaranty, must measure the trial judge's action in declaring the mistrial against a standard of good trial practice. If the trial judge has conspicuously failed to meet such a standard, then, regardless of the nature or the consequences of the error, the Constitution bars another trial. In my view, this reasoning is both overbroad and flatly inconsistent with this Court's decision in *Gori* v. *United States, supra.*

In that case, the trial judge had discharged the jury during the first day of trial, taking such action apparently

to forestall prejudicial error after inferring that the prosecuting attorney's line of questioning presaged inquiry calculated to inform the jury of other crimes by the accused. The Court of Appeals held that the declaration of a mistrial under these circumstances did not prevent a new trial on the merits:

> "Here the defendant was in no way harmed by the brief trial which, indeed, revealed to him the prosecution's entire case. He was thus in a position to start anew with a clean slate, with all possibility of prejudice eliminated and with foreknowledge of the case against him. The situation was quite unlike the more troublesome problems found in various of the cases, as where the prosecution desires to strengthen his case on a new start or otherwise provokes the declaration of mistrial, or the court has acted to the prejudice of the accused, or the accused has actually been subjected to two trials for essentially the same offense. On the other hand, for the defendant to receive absolution for his crime, later proven quite completely, because the judge acted too hastily in his interest, would be an injustice to the public in the particular case and a disastrous precedent for the future." 282 F. 2d 43, 48 (CA2 1960).

This Court declined to pass on the Court of Appeals' judgment that there had been no abuse of discretion, noted that the case involved neither harassment nor an attempt to augment the chances of conviction, and concluded:

> "Suffice that we are unwilling, where it clearly appears that a mistrial has been granted in the sole interest of the defendant, to hold that its necessary consequence is to bar all retrial. It would hark back to the formalistic artificialities of seventeenth century criminal procedure so to confine our federal

trial courts by compelling ther elling them to navigate a narrow compass between Scylla and cylla and Charybdis. We would not thus make them unduly h unduly hesitant conscientiously to exercise their most sensitivst sensitive judgement—according to their own lights in the ghts in the immediate exigencies of trial—for the more effec hore effective protection of the criminal accused." 367 U. S. 367 U. S., at 369–370.

Gori established, I think corr hink correctly, that the simple phrase "abuse of discretion" is n tion" is not enough in itself to resolve double jeopardy questions questions in cases of this kind. Whether or not there has been a as been an "abuse of discretion" sufficient to bar retrial cannot b cannot be determined without reference to the purpose and effec and effect of the mistrial ruling. The real question is whether ther ether there has been an "abuse" of the trial process resulting in p lting in prejudice to the accused, by way of harassment or the lik or the like, such as to outweigh society's interest in the punishm punishment of crime. It is in this context, rather than simply n simply in terms of good trial practice, that the trial judge's "ab judge's "abuse of discretion" must be assessed in deciding the questi the question of double jeopardy.[3]

Applying these considerations t erations to the record in this case, it seems clear to me that a tria hat a trial on the merits would

[3] *Downum* v. *United States*, 372 U. S. s, 372 U. S. 734, is not to the contrary. As the plurality opinion today points ou ay points out, that case recognized that "lack of preparedness by the Government Government to continue the trial directly implicates policies underpinning both th ing both the double jeopardy provision and the speedy trial guarantee," *supra*, a ee," *supra*, at —. Failure of the prosecution to go forward with its case in an ner is quite different from even a seriou e case in an expeditious and orderly manthe presiding judge. It is of course well ven a serious error in trial procedure by dict is reversed on appeal because of course well settled that when a jury ver- a new trial is permitted, *e. g.*, *Forman* because of an error by the trial judge, 416; *Bryan* v. *United States*, 338 U. S. *g.*, *Forman* v. *United States*, 361 U. S. v. *Tateo*, 377 U. S. 463, the Court s, 338 U. S. 552. And in *United States* the Double Jeopardy Clause where the the Court held retrial not barred by a plea of guilty coerced by clearly imp e where the first trial was terminated on judge during the proceedings. clearly improper statements by the trial s.

not violate the constitutional guaranty. It is quite true, as the plurality opinion insists, that the mistrial was declared for the benefit of the witnesses rather than for the "sole benefit of the defendant." But except for the inconvenience of delay always caused by a mistrial, the judge's ruling could not possibly have injured the defendant. Had the witnesses heeded the trial judge's advice, it is at least possible that the defendant's position might have been very substantially improved by their refusal to testify upon the grounds of the guaranty against compulsory self-incrimination. The line of questioning that resulted in the mistrial may have been initiated by defense counsel with just such a result in mind. There is, of course, no showing of an intent on the part of either the prosecutor or the judge to harass the defendant or to enhance the chances of conviction in a second trial. And as in *Gori*, the defense was given a complete preview of the Government's case. Even assuming that the trial judge's action was plainly improper by any standard of good trial practice, the circumstances under which the mistrial was declared did not involve "abuse" of a kind to invoke the constitutional guaranty against double jeopardy.

I respectfully dissent from the judgment of the Court.